

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 17961

877

UNITED FURNITURE WORKERS OF AMERICA,
AFL-CIO and LOCAL 270, UNITED FURNITURE
WORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW DECISION AND ORDER OF
NATIONAL LABOR RELATIONS BOARD

MARTIN RAPHAEL,
General Counsel for Petitioners,
165 Broadway,
New York City.

United States Court of Appeals

for the District of Columbia Circuit

FELLER, BREDHOFF & ANKER,
Counsel for Petitioners,
1001 Connecticut Avenue, N.W.,
Washington 6, D. C.

FILED DEC 20 1963

Nathan J. Paulson
CLERK

ARNOLD ORDMAN,
General Counsel for Respondent,
1717 Pennsylvania Avenue,
Washington, D. C.

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Pursuant to leave of Court granted at the oral argument of this case on February 19, 1964, and the letter by the Clerk of the Court to the Board on February 24, 1964, in connection with this case, the Board files this memorandum to supplement its printed brief previously filed with the Court.

1. At oral argument, the Court inquired whether the Company was engaging in a lockout when the strike began on June 1, 1961. The following portions of the joint appendix establish that the Company was not engaging in a lockout: J.A. 353a, 354a-355a, 345a, 130a.

MARCEL MALLET-PREVOST,
Assistant General Counsel,

MELVIN J. WELLES,
NANCY SHERMAN,

Attorneys,
National Labor Relations Board.

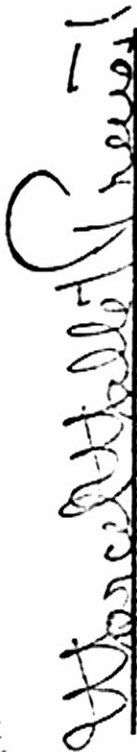
February, 1964.

served by first class mail upon the following counsel at the address
listed below:

Martin Raphael, Esq.
165 Broadway
New York, New York

Edgar E. Bethell, Esq.
107 Professional Life Bldg.
Fort Smith, Arkansas

Feller, Bredhoff & Anker
1001 Connecticut Ave., N.W.
Washington 6, D.C.



Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.,
this 26th day of February, 1964.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT for the District of Columbia Circuit

FILED FEB 27 1964

No. 17,961

Nathan J. Paulson
CLERK

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO
AND LOCAL 270, UNITED FURNITURE WORKERS OF
AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND MODIFY AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

2. On page 10 of its reply brief, the Union for the first time suggested that the statute as interpreted by the Board might violate the Thirteenth Amendment to the Constitution of the United States. This contention is refuted by the following cases: International Union, U.A.W., A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 250-251; Local 74, United Brotherhood of Carpenters and Joiners of America v. N.L.R.B., 341 U.S. 707, 715, affirming 181 F. 2d 126, 132 (C.A. 6), and cases cited in the Court of Appeals' opinion; Local Union 219, Retail Clerks' International Association, AFL-CIO v. N.L.R.B., 105 App. D.C. 232, 237, 265 F. 2d 814, 819.

Respectfully submitted,

ARNOLD ORDMAN,

General Counsel,

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED FURNITURE WORKERS OF AMERICA, :
AFL-CIO AND LOCAL 270, UNITED FURNITURE :
WORKERS OF AMERICA, AFL-CIO, :
: :
: :

Petitioners,

v.

No. 17,961

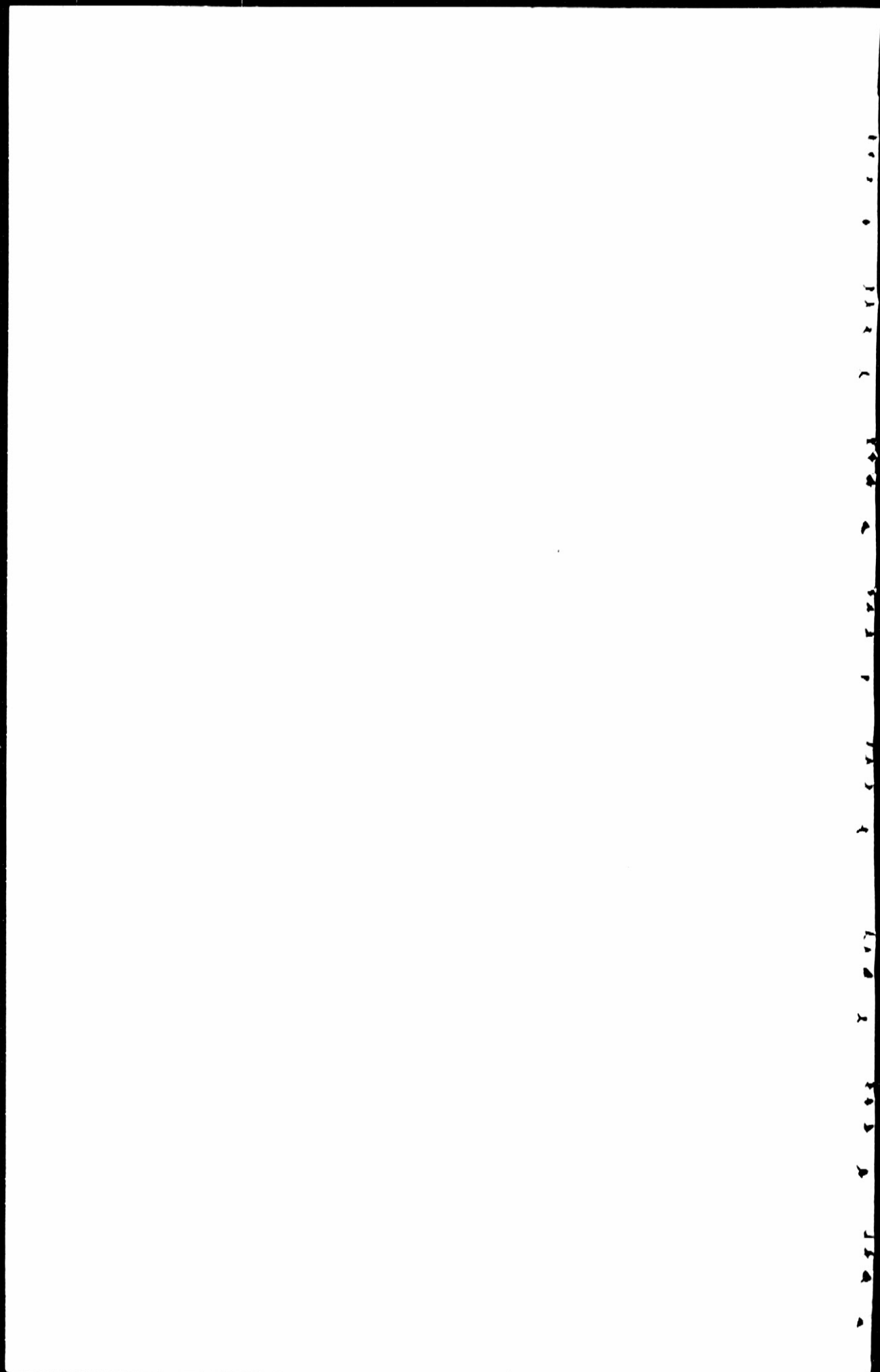
NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's

supplemental memorandum in the above-captioned case has this day been



INDEX

	PAGE
Prehearing Order	1a
Prehearing Conference Stipulation Regarding Questions Presented, and Joint Motion for Extension of Time to File Briefs and Joint Appendix	2a
Stipulation Regarding Printing of Joint Appendix ..	4a
Complaint and Notice of Hearing	5a
Answer	13a
Amended Answer	14a
Decision and Order of the Board	18a
Concurring Opinion of Frank W. McCulloch, Chairman	28a
Dissenting Opinion of John H. Fanning, Member ..	29a
Intermediate Report of Trial Examiner	40a
Transcript of Testimony	70a
General Counsel's Exceptions to the Intermediate Report	527a
Respondent's Statement of Exceptions to the Intermediate Report	528a

TESTIMONY

GENERAL COUNSEL'S WITNESSES

Louie Campbell:	
Direct	85a
Cross	120a
Elmer Bost:	
Direct	163a
Cross	173a
Redirect	174a
Recross	176a

	PAGE
D. C. Cherry:	
Direct	177a
Cross	185a
Redirect	188a
Recross	203a
Clyde Bearce:	
Direct	205a
Cross	215a

RESPONDENT'S WITNESSES

Edgar E. Bethell:	
Direct	225a
Cross	274a
Redirect	306a
Recross	314a
Re-redirect	324a
John Ayers:	
Direct	330a
Cross	354a
William Glover Weeks:	
Direct	404a
Cross	405a
Tommy Condren:	
Direct	417a
Cross	419a
Redirect	430a
Recross	431a

EXHIBITS

GENERAL COUNSEL'S EXHIBITS

	PAGE
1(A)—Charge against employer, dated June 19, 1961, marked in evidence at page 76a	447a
1(F)—Telegram, received January 9, 1962, marked in evidence at page 76a	449a
1(H)—Order rescheduling hearing, dated February 12, 1962, marked in evidence at page 76a	449a
2—Stipulation, dated February 15, 1962, marked in evidence at page 80a	450a
3—Letter, dated October 15, 1960, marked in evidence at page 83a	489a
4—Letter, dated February 23, 1961, marked in evidence at page 84a	491a
5—Letter, dated March 17, 1961, marked in evidence at page 85a	492a
6—Written proposals submitted to Union, marked in evidence at page 90a	493a
7—Telegram, received June 8, 1961, marked in evidence at page 115a	499a
8—Letter, dated June 8, 1961, marked in evidence at page 117a	500a
9—Letter, dated June 8, 1961, marked in evidence at page 117a	501a
10—Ballot used in secret vote, marked in evidence at page 203a	501a
11—Letter, dated December 15, 1961, marked in evidence at page 224a	502a

INTERVENOR'S EXHIBITS

	PAGE
1—Company proposals of May 31, 1961, marked in evidence at page 297a	503a
2—Arbitration opinion and award, marked in evidence at page 319a	504a
3—Letter, dated January 21, 1961, marked in evidence at page 323a	509a
4—Letter, dated April 14, 1961, marked in evidence at page 323a	515a
5—Letter, dated July 15, 1961, marked in evidence at page 320a	517a
6—Leaflet issued by Union, marked in evidence at page 394a	522a
7—Leaflet issued by Union, marked in evidence at page 390a	523a
8—Leaflet issued by Union, marked in evidence at page 390a	524a
11—Excerpt from "Fort Smith News", marked in evidence at page 393a	525a

United States Court of Appeals

For the District of Columbia Circuit

September Term, 1963

No. 17,961

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, and
LOCAL 270, UNITED FURNITURE WORKERS OF AMERICA,
AFL-CIO

v.

NATIONAL LABOR RELATIONS BOARD

Before:

BAZELON, *Chief Judge*,
in Chambers.

Prehearing Order

On consideration of petitioners' motion for enlargement of time to file brief, and counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, in which they agree upon a briefing schedule, and the stipulation having been considered, in the interest of avoiding further delay in the disposition of this matter, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

No extensions of time for filing the briefs of the parties in this case will be granted.

Dated: November 19, 1963.

**Prehearing Conference Stipulation Regarding
Questions Presented, and Joint Motion for
Extension of Time to File Briefs and
Joint Appendix**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[SAME TITLE]

**I. PREHEARING CONFERENCE STIPULATION REGARDING
QUESTION PRESENTED**

The parties stipulate and agree as follows regarding the questions presented in this case:

- 1) Whether the Board erred in finding that the union violated Section 8(d) of the Act?
- 2) Whether the Board erred in finding that the individual strikers lost their status as employees pursuant to Section 8(d) of the Act?
- 3) Whether the Board erred in finding that the conduct of the strikers was not protected activity under Sections 7 and 13 of the Act?
- 4) Whether the Board erred in finding that the company's discharge of the strikers did not violate Section 8(a)(1) and (3) of the Act?
- 5) Whether the Board erred in finding that the company's conduct did not constitute a refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act?

*Prehearing Conference Stipulation Regarding Questions
Presented, and Joint Motion for Extension of Time to
File Briefs and Joint Appendix*

II. JOINT MOTION FOR EXTENSION OF TIME TO FILE
BRIEFS AND JOINT APPENDIX

For the reasons set forth in petitioners' motion for enlargement of time within which to file its brief, the parties hereto respectfully move this Court for an extension of time to file the briefs and the joint appendix, in accordance with the following schedule:

1. The record in this case shall be reduced to a Joint Appendix, to be comprised of the materials each party may designate, with each party bearing the cost of printing the material contained in its designation. Petitioners' designation shall include the Intermediate Report, the Board's Decision and Order, this stipulation and motion and the Court's order in connection therewith, and all other material which the Court's rules require petitioners to include in any appendix to their brief. Petitioners will supervise the printing of the joint appendix.

2. Petitioners will file and serve their opening brief and the joint appendix on or before December 20, 1963.

3. The Board will file and serve its answering brief on or before January 17, 1964.

4. Petitioners will file and serve their reply brief, if any, on or before January 31, 1964.

Dated at Washington, D. C.,
this 8th day of November, 1963.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C.,
this day of November, 1963.

.....
Counsel for Petitioners.

Stipulation Regarding Printing of Joint Appendix

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[SAME TITLE]

The parties hereto stipulate and agree as follows regarding the contents and printing of the joint appendix:

1. The entire record in the case shall be printed in the joint appendix.

2. Petitioners shall pay the cost of printing the Intermediate Report, the Board's Decision and Order, the pre-hearing conference stipulation and the Court's order in connection therewith, and all other material which the Court's rules require petitioners to include in any appendix to their brief. The cost of printing the remaining portions of the joint appendix shall be equally divided between the parties.

3. Petitioners shall supervise the printing of the joint appendix. The printing shall be done by Hecla Press, 225 Varick Street, New York, New York. Fifty (50) copies of the joint appendix shall be printed. The copies not filed with the Court shall be equally divided between the parties. Should either party wish to file a petition for certiorari with the Supreme Court of the United States, counsel for the other party shall make available, without additional

Complaint and Notice of Hearing

charge, all copies of the joint appendix in his possession, except that he may retain three for his own use.

Dated at Washington, D. C.,
this 22nd day of November, 1963.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at New York, N. Y.,
this 25th day of November, 1963.

MARTIN RAPHAEL,
Counsel for Petitioners.

Complaint and Notice of Hearing

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SIXTH REGION
Case No. 26-CA-1094

[SAME TITLE]

It having been charged by Local 270, United Furniture Workers of America, AFL-CIO, herein called the Union, that Fort Smith Chair Company, herein called the Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined

Complaint and Notice of Hearing

in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Twenty-Sixth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations—Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1

The original charge was filed by the Union on June 20, 1961, and was served on the Respondent on or about June 20, 1961, by registered mail.

2

Respondent is now, and has been at all times material herein, an Arkansas corporation with its place of business at Fort Smith, Arkansas, where it is engaged in the manufacture of furniture.

3

Respondent, in the course and conduct of its business operations, annually manufactures, sells and distributes at said Fort Smith, Arkansas, plant, products valued in excess of \$1,000,000, of which products valued in excess of \$1,000,000 are shipped from said plant directly to points outside the State of Arkansas.

4

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Complaint and Notice of Hearing

6

All production and maintenance employees of the Respondent employed at its Fort Smith, Arkansas, plant, exclusive of office clerical employees, foremen, inspectors who do no production work, time-keepers, salesmen, over-the-road truck drivers and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7

At all times material herein, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph 6 and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

8

On or about June 9, 1961, and continuing to date, the Union has requested, and is requesting, the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining representative of all the employees of the Respondent in the unit described above in paragraph 6.

9.

On or about June 9, 1961, and continuing to date, the Respondent did refuse to recognize and/or bargain with the Union notwithstanding that the Union was and is the duly designated exclusive collective-bargaining representative of the employees, as described above in paragraph 7.

Complaint and Notice of Hearing

10.

On or about June 1, 1961, certain employees of the Respondent, employed at its Fort Smith, Arkansas, plant, ceased work concertedly and went out on strike, and since that date have engaged in, and are engaging in, such concerted work stoppage or strike.

11.

On or about June 8, 1961, the Respondent discharged the employees named below:

Charlie Abney	Roland Boyette
Ervin Adkins	Lee Brewer
Clifford Aldridge	Irving Brown
Robert Anderson	Connie Brown
Olen Ballard	Perry Brunk
Mae Ballard	Freddy Cagle
Frank Ballard	Jess Caldwell
Travis Ballard	J. E. Carr
Alex Banning	Jennie Casto
James Barker	Charles Chapman
Eunice Bartlett	E. R. Chadwick
Lois Barrow	D. C. Cherry
Retha Barnard	Paul Clark
Charley Barnes	Jessie Coppinger
Mildred Battles	Jim Crabtree
Raymond Battles	Agnes Darter
Jean Battles	Dwain Derrick
Johnny Beagle	Will Doss
Clyde Bearce	Velma Doyel
Harrison Beckham	Tracy Durham
Everett Been	Marvin Durham
Billy Belt	Audra Dustman
Garrette Belt	Winfred Dustman
Omer Blythe	Floyd Dustman
Conway Bowlet	Susie Earls

Complaint and Notice of Hearing

Ray Easter	Lennie Keck
Noah Edwards	Jimmy Kinnerson
Isom Edwards	Roy Kirby
Billy English	Henry Kusel
William Eiland	Clyde LaRue
Emmett Fleetwood	Jerry LaRue
Russell Freeman	Alfred LaRue
Frankie Freeman	E. J. Lewis
Elizabeth Friga	Arnes Lovell
Darrell Gallihar	Verna Lovell
F. M. Gentry	Lester Lovell
Goldie Gilbert	Leonard Mankins
Johnnie Gilbert	Mary Martin
Otis Gilliam	Jimmy Matlock
Thomas Green	Orlan Matlock
Virgil Harvell	John Mayfield
Gladys Harman	V. J. Mean
Jimmy Harris	Martha McClendon
Ruth Hassell	Emogene McConnell
Martha Hatley	Elsie McDonald
Herbert Hawkins	Rachel Meadors
Harlen Hawkins	Dorothy Milburn
Gerald Hay	James Moody
L. C. Hayes	Earl Moore
E. C. Hesson	Corthel Mongold
Billy Hesson	Clinton Morris
Jimmy Hicks	Winfred Nelson
Eula Hopkins	Kenneth Nena
Leonard Howard	Darrell Newton
Cecil Hubbard	Lilly Ohm
James Hulsey	William Olander
Mildred Hunter	Tommy Orsborne
Robert Hyde	Raymond Patterson
Aaron Hyde	Eula Mae Pennington
Bessie Jiles	John Peters
Carl Jones	Aline Petree

Complaint and Notice of Hearing

Susie Pinkerton	Oscar Stapp
Henry Pitchford	Harry Stevens
Agnes Pool	Cecil Stephens
Jasper Potts	Joe Stephens
Charles Proctor	Henry Stewart
William Radcliff	Aline Stockton
Esther Reavis	Louis Stroud
Walter Reed	Charles Swaim
Essie Rhodes	Bertie Sweet
William Rhodes	Willie Sweet
Thel Richmond	Ferrell Tabor
Clifford Ridenoure	John Thomas
J. W. Riggs	Claudie Tindall
Leo Roberts	David Tidwell
Clarence Robertson	Pleasant Todd
Eddie Robison	Martin Toon
Jerry Rogers	Elsie Treat
William Rucker	Zady Tucker
Lucille Ruckman	Frank Vann
Orville Satterfield	Clifford Vaughan
Larry Seabolt	Ulyssess Vaughan
Mary Scholze	John Vaughan
Eugene Schmalz	J. L. Vaughan
Olen Shafer	Jewell Vernon
Ursula Shields	Jessie Wadkins
Jack Short	N. S. Walkord
Martha Sloss	Jess White
Richard Sloss	Grace White
J. C. Small	Roy Whitsett
Dorothy Smith	George Whitledge
Wendel Smith	Buster Whisenhunt
Charles Spangler	Charles Whithurst
Bobby Sparkman	Vesta Wilson
A. L. Spence	Jack Wilson
Donald Spradling	Johnny Wilson
Jewell Stallings	Riley Wilson

Complaint and Notice of Hearing

Charles Wilson
Harrison Willhite
Herbert Willhite
Fred Williams

James Williams
Lawrence Woodward
Harrison Young
Eula Belle Young

12.

Since about June 8, 1961, Respondent has failed and refused, and continues to fail and refuse, to reinstate said employees to their former or substantially equivalent positions of employment.

13.

Respondent discharged the employees named above in paragraph 11, and has failed and refused, and continues to fail and refuse, to reinstate said employees to their former or substantially equivalent positions of employment because said employees had joined or assisted the Union or engaged in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection and/or had participated in the strike described above in paragraph 10.

14.

By the acts described above in paragraphs 9, 11, 12, and 13, and by each of said acts, the Respondent engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

15.

By the acts described above in paragraphs 11, 12, and 13, and by each of said acts, the Respondent engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

Complaint and Notice of Hearing

16.

By the acts described above in paragraph 9, and by each of said acts, the Respondent engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 20th day of February, 1962, at ten o'clock in the forenoon (CST), in the US District Court Room, Federal Building, Fort Smith, Arkansas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Memphis, Tennessee, this 29th day of December 1961.

JOHN J. A. REYNOLDS, JR., Director
Twenty-Sixth Region
National Labor Relations Board
722 Falls Building
Memphis 3, Tennessee.

Answer

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SIXTH REGION
Case No. 26-CA-1094

[SAME TITLE]

I.

The Respondent admits the allegations of paragraphs 1 through 6 of the complaint.

II.

The Respondent denies each and every material allegation of paragraphs 7 through 16 of the complaint, and further states that any action on its part in refusing to bargain with the Union was wholly justified by the neglect and failure of the Union to comply with the requirements of Section 8(d)(3) and (4) of the National Labor Relations Act, as amended.

WHEREFORE, the Respondent prays that the complaint be dismissed as without merit.

FORT SMITH CHAIR COMPANY

By EDGAR E. BETHELL
Its Attorney

Amended Answer

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TWENTY-SIXTH REGION

Case No. 26-CA-1094

[SAME TITLE]

Comes now the Respondent, and for its Answer to the Complaint filed herein, states as follows:

1.

The Respondent admits the allegations of paragraphs 1 through 6 of the Complaint.

2.

The Respondent denies the allegations of paragraph 7 of the Complaint, except that the Respondent does admit that on and before May 31, 1961, the Union was the representative of its employees for the purposes of collective bargaining.

3.

The Respondent denies the allegations of paragraph 8 of the Complaint.

4.

The Respondent admits that from on or about June 9, 1961, and continuing to date, it has refused to bargain with the Union, but denies that on and after said date the Union was or is the duly designated exclusive collective bargaining representative of its employees. Respondent further states that its refusal to bargain with said Union

Amended Answer

on and after June 9, 1961, was wholly justified by the action of the Union in instigating an illegal work stoppage by Respondent's employees in violation of Section 8(d)(3) and (4) of the National Labor Relations Act, as amended, and as a result of which said individuals lost their status as employees of the Respondent.

5.

Respondent admits the allegations of paragraph 10 of the Complaint, except Respondent states that said strike is not continuing, and was in fact terminated on or about December 14, 1961. Respondent further alleges that said strike was unlawful in its inception because of the failure or neglect of the Union to comply with the requirements of Section 8(d)(3) and (4) of the Act before commencing the concerted work stoppage.

6.

Respondent admits that on or about June 8, 1961, it discharged certain individuals who had been in its employ, and who at the time of their termination were engaged in an unlawful work stoppage. Respondent denies that all of the persons named in paragraph 11 of the Complaint were discharged on June 8, 1961, and states that the following named individuals were terminated on the date indicated after the respective names, and before the work stoppage began on June 1, 1961:

Lois Barrow	Quit May 3, 1961
Paul Clark	Quit May 18, 1961
E. J. Lewis	Quit May 19, 1961
Arnes Lovell	Quit May 1, 1961
John Peters	Quit April 11, 1961
Fred Williams	Quit May 12, 1961

Amended Answer

The employment of the following named individuals was not terminated on or about June 8, 1961, but at some later date indicated opposite each name, when it was ascertained that the individual was participating in the illegal work stoppage:

Olen Ballard	July 28, 1961
Alex Banning	July 17, 1961
Audra Dustman	June 27, 1961
Martha Hatley	July 21, 1961
Jimmie Hix	July 17, 1961
Aline Petree	June 14, 1961
Essie Rhodes	June 27, 1961
Mary Scholze	June 14, 1961
Charles Spangler	June 27, 1961
A. L. Spence	November 16, 1961
Buster Whisenhunt	September 21, 1961

The employment of the following named employees was never terminated:

Mae Ballard	Thel Richmond
Jess Caldwell	Wendell Smith
F. M. Gentry	Aline Stockton
Robert Hyde	David Tidwell
Emogene McConnell	

The following named individual appearing in paragraph 11 of the Complaint was not an employee of the Respondent at any time material to the Complaint, and no such name appears on the Company's personnel records:

James Moody

7.

Respondent denies the allegations of paragraph 12 of the Complaint, and states that in addition to the persons named in paragraph 6 above who were never terminated,

Amended Answer

the following individuals were re-employed on the date stated opposite the respective name:

Travis Ballard	September 5, 1961
Mildred Battles	December 21, 1961
Marvin Durham	December 21, 1961
Audra Dustman	December 26, 1961
Herbert Hawkins	December 20, 1961
Billy Hesson	December 27, 1961
Eula Hopkins	September 1, 1961
John Mayfield	December 27, 1961
Susie Pinkerton	August 31, 1961
Agnes Pool	December 21, 1961
Bobby Sparkman	December 18, 1961
Cecil Stephens	September 8, 1961
Louis Stroud	September 5, 1961
Claudie Tindall	November 30, 1961
Harrison Willhite	December 26, 1961

8.

The Respondent denies the allegations of paragraphs 13 through 16 of the Complaint.

WHEREFORE, Respondent prays that the complaint be dismissed.

FORT SMITH CHAIR COMPANY

By: BETHELL & PEARCE,
Its Attorneys

By EDGAR E. BETHELL
107 Professional Life Building
Fort Smith, Arkansas

Decision and Order of the Board

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 26-CA-1094

FORT SMITH CHAIR COMPANY

and

**LOCAL 270, UNITED FURNITURE WORKERS OF
AMERICA, AFL-CIO¹**

On May 21, 1962, Trial Examiner Sidney S. Asher, Jr., issued his Intermediate Report herein, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, Respondent and the General Counsel filed exceptions to the Intermediate Report along with supporting briefs and the Charging Party filed a brief in support of the Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and finds merit in the exceptions of the Respondent. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent that they are consistent with this Decision and Order.

¹ United Furniture Workers of America, AFL-CIO, intervened and participated at the hearing herein; it also filed a brief.

Decision and Order of the Board

The Complaint alleges and the Trial Examiner found that the Respondent violated Section 8(a)(1), (3), and (5) by discharging its striking employees and thereafter refusing to bargain with their collective bargaining representative. The Respondent contends that it discharged its employees because they were engaged in an unlawful strike and that, in any event, the strikers had, under the loss-of-status provisions of 8(d), lost their status as employees by reason of their representative's failure, before the strike, to file timely notices, as required by Section 8(d)(3). In consequence, the Respondent argues, it did not violate 8(a)(3) by discharging the strikers nor did it violate 8(a)(5) by thereafter refusing to bargain because the Union in view of the discharges lost its majority representative status. We find merit in the Respondent's contentions.

The relevant facts, briefly summarized, establish the following: Local 270, United Furniture Workers of America, AFL-CIO, herein called the Union, and the Respondent, have had bargaining relations since about 1940. The most recent agreement between the parties was of 2 years duration with a stated May 31, 1961, expiration date. Consistent with the notice provision of the contract and with the statutory requirement of Section 8(d)(1)² the Union.

² Section 8(d) of the Act, as amended, provides, in part, as follows:

* * * where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party of the proposed termination or modification sixty days prior to the expiration date thereof * * *.

* * *

(Continued on page 20a)

Decision and Order of the Board

on March 27, 1961, gave notice of its desire to terminate the contract and to negotiate a new agreement. The parties met and bargained on May 29 and 31.³ No agreement was reached and on June 1 a strike began. As of June 1, the notices to Federal Mediation and Conciliation Service and to the state department of labor required by Section 8(d)(3) had not been received and so far as appears had not been sent. On June 7, while the strike was in progress, the parties again negotiated; a representative of Federal Mediation and Conciliation Service was then in attendance for the first time. No agreement was reached and another meeting was scheduled for the next day. However, no such meeting did, in fact, occur as Respondent, on June 8, notified the Union that it would not continue negotiations because of the unlawful nature of the strike. Simultaneously, the Respondent notified each striker that he was terminated because he had engaged in an unlawful work stoppage. On June 13, Respondent resumed operations with new employees, and made certain wage and incentive system changes without consultation with the Union.

The Trial Examiner found that, immediately preceding the strike, the Union was willing to accept the old contract

(Continued from page 19a)

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, * * * and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract, for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * *

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purpose of Sections 8, 9 and 10 of this Act, as amended * * *.

³ All dates refer to 1961 unless otherwise designated.

Decision and Order of the Board

with minor changes already agreed upon. In view of this and his further finding that, at this point, Respondent was demanding modification of the old contract, he concluded that the purpose of the strike was not to cause termination or modification of the contract, but was rather to force Respondent to abandon its insistence upon substantial changes in the agreement. From these preliminary findings, the Trial Examiner reasoned that as the strike was not for the purpose of modifying or terminating the contract, 8(d) was not applicable and the strikers were, consequently, engaged in a lawful, economic strike for which they could not be lawfully discharged.⁴

The Trial Examiner has found, in effect, that while 8(d) imposes its requirements upon the party desiring to terminate or modify the contract, the duty of complying with these requirements may at times shift from the party who initially invokes that section to the other party. We perceive no basis in this section, or in the legislative history, for viewing the responsibility under this section so tentatively. To make this section's continued applicability to the party initially desiring the change turn on the unpredictable course which the ensuing bargaining may take is to bring the disquiet of a potential lockout or a strike into an area where Congress wanted quiet—indeed, a “cooling-off” period. We therefore conclude contrary to the Trial Examiner that, by serving notice of its desire to terminate the existing contract and to negotiate a new agreement, the Union took upon itself the responsibility for complying with the remaining requirements of Section 8(d) before engaging in a strike and that its failure to file the notices

⁴ Absent any violation of Section 8(d), the strike would appear to have been a lawful, economic strike. While the Union contends that the Respondent failed, and refuses to bargain in good faith before the strike and that the strike must therefore be viewed as an unfair labor practice strike at its inception, the record provides no support for this contention nor was it alleged in the complaint.

Decision and Order of the Board

required by 8(d)(3) caused the strike to be unlawful from its inception.⁵

While we have assumed heretofore the correctness of the Trial Examiner's finding that, immediately prior to the strike, the Union was seeking solely the old contract, the record does not substantiate his finding. For, it is abundantly clear that the Union was seeking rather a *contract with modifications already agreed upon* in the course of negotiations. Nor do we believe that *Mastro Plastics Corp. v. N. L. R. B.*,⁶ cited by the Trial Examiner, supports a finding as to the legality of the strike. That decision by its very language dealt with the situation of a strike by employees " * * * solely against unfair labor practices of their employer."⁷ As indicated above, the strike here was not in protest against employer unfair labor practices, nor, as indicated above, does the complaint contain such allegation. *Mastro Plastics*, therefore, is wholly inapposite.

As we have found the June 1 strike to be unlawful, the Respondent could, as it contends it did, lawfully discharge employees because they engaged in the strike. However, the General Counsel contends, and excepts to the Trial Examiner's failure to find, that the real reason for discharging the strikers was not the strike but the desire of the Respondent to rid itself of the Union. The General Counsel attaches a controlling significance to the testimony of Respondent's secretary-treasurer given in response to a question as to why he discharged the strikers. In substance, this witness testified that, before reaching his deci-

⁵ *Retail Clerks International Association, Local No. 1179 AFL, etc. (J. C. Penney Company)*, 109 NLRB 754; *Local Union 219, Retail Clerks v. N.L.R.B.*, 265 F. 2d 814 (C. A. D. C.).

⁶ 350 U. S. 270 (1956).

⁷ 350 U. S. at 271.

Decision and Order of the Board

sion he had considered the Respondent's financial difficulties, the Respondent's difficulty in obtaining changes in working conditions, the Union's harassment of Respondent through the filing of grievances, and the Union's uncompromising attitude. This is no more than a formulation of the background against which the Respondent decided to exercise its lawful right to discharge its employees for engaging in an unlawful strike. It falls short of being an admission of illegal motivation. Given a valid reason, as here, for discharging its employees and the fact that this reason was set forth in the Respondent's letter to these employees shortly after Respondent learned of the non-compliance with 8(d), there is ample basis on the entire record for concluding, as we do here, that employee participation in the unlawful strike was the real reason for the discharge.

Moreover, apart from the foregoing, we find that the Respondent's motive in discharging the strikers is not a relevant consideration. The strike here was an *unlawful*, and not merely an unprotected, activity,⁸ and by engaging in such a strike, the employees "forfeited their rights to protection of the Act."⁹ To hold otherwise would, in effect, protect the strikers in their unlawful conduct, a result clearly in collision with the Board's responsibility to discourage such conduct.¹⁰

As set forth in footnote 2, above, Section 8(d) requires both 60-day and 30-day notices. The so-called loss-of-status

⁸ See cases, cited footnote five.

⁹ *MacKay Radio and Telegraph Company, Inc.*, 96 NLRB 740, 742-743.

¹⁰ Agreeing with the majority that Respondent did not have a discriminatory intent, Member Brown finds it unnecessary to consider what the situation would be had Respondent's motive been otherwise; and, in view of the specific language of Section 8(d), he also finds it unnecessary to rely on *MacKay Radio, supra*.

Decision and Order of the Board

provision of Section 8(d) provides that "any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for purposes of Sections 8, 9 and 10 of this Act * * *." The General Counsel and the Union argue that because only one sixty-day period is "specified" in Section 8(d)—that set forth in subsection (1) and beginning with the date of service of the notices required by that subsection, the loss-of-status provision should be interpreted as applying only to a strike occurring within the 60-day period following service of the 8(d)(1) notices and without regard to the serving of the 30-day notice under 8(d)(3). Under such a construction, their argument goes, the strikers in this proceeding would not lose their status as employees since the strike commenced more than 60 days after service. However, to give such a literal construction of the waiting period to the loss-of-status provision is to wrench it from the rest of Section 8(d). As one court has stated, " * * * there are no 'plain words' of Section 8(d)." ¹¹ Rather, the section must be interpreted in light of the dual purposes of the Act to protect concerted activities and to substitute collective bargaining for economic warfare.¹² To aid the latter purpose, Section 8(d) not only provides for a 60-day period during which the parties to a contract are to bargain without strike or lockout but also provides in 8(d)(3) for the full use of mediation services during at least half of such period. While subsections (1) through (4) place certain obligations upon the contractual parties in order to assure that bargaining and mediation can proceed for a reasonable time free from direct economic pressures, the loss-of-status pro-

¹¹ *Local Union 219, Retail Clerks v. N.L.R.B.*, *supra*, at 817.

¹² E.g., *Mastro Plastics Corp.*, *supra*, at 284, see also Sections 201-205 (Title II) of the Act.

Decision and Order of the Board

vision, in effect, places an obligation upon employees for the same purpose. Consequently, it seems obvious to us that the various parts of Section 8(d) here involved must be read together in order to create an effective and consistent statutory means for achieving the purpose of the section.

It is true that subsection 8(b)(4), which limits the rights of the contracting parties to resort to strike or lockout, defines the proscribed period as one of "sixty days after such notice is given" and that this Board and Court have recognized that the period thus described refers to that "specified" in 8(d)(1). However, it has also been concluded that, where late notices under 8(d)(3) to the Mediation and Conciliation Service are filed, the waiting period must be extended to include a full 30 days after the filing of such notices in order to give mediation its intended statutory period in which to work. Indeed, a strike within the 30-day period is unlawful and is therefore enjoined.¹³ By parity of reasoning, the "sixty-day period specified in the subsection" set forth in the loss-of-status provision requires the same interpretation to protect the period for mediation. Surely, the statutory language suggests no basis for concluding that the similarly worded waiting periods of Section 8(d) should vary from clause to clause and, as indicated above, we believe there are cogent reasons why they should not. Consequently, we conclude that the loss-of-status provision is applicable not only to strikes within the initial 60-day period but also to those strikes beginning less than 30 days after service of the 8(d)(3) notices, or, with respect to the present case, to those occur-

¹³ *Local 219 Retail Clerks v. N.L.R.B.*, *supra*, and *Retail Clerks International Association, Local No. 1179 AFL, etc. (J. C. Penney Company)*, *supra*.

Decision and Order of the Board

ring absent the filing of such notices.¹⁴ We finally conclude, therefore, that, by operation of the loss-of-status provision of Section 8(d), the strikers lost their employee status and the protections of Section 8(a) when they walked out on June 1 and that, consequently, such motive as may have

¹⁴ Our dissenting colleague contends that *Retail Clerks International Association, Local No. 1179 AFL, etc. (J. C. Penney Company)*, *supra*, and "related cases" support his view as to the effect of the "loss-of-status" provision where no 8(d)(3) notices have been filed and a strike occurs after the initial 60-day period has expired. He would conclude that by ordering the union to bargain, in *J. C. Penney Company*, the Board, by implication, held the strikers had not lost their employee status, since, if it were otherwise, the union would have had no majority status on which to base a bargaining order. However, matters concerning the applicability of the various provisions, including that of the loss-of-status provision, do not automatically intrude themselves into the consideration and disposition of a case by the Board, but must be properly raised by the party seeking to rely upon them. See *N.L.R.B. v. Giustina Bros. Lumber Co.*, 253 F. 2d 371 (C. A. 9). Consequently, as no party apparently raised the loss-of-status provision in *J. C. Penney*, and related cases, the Board could not, absent overriding policy considerations, have construed that provision in reaching its decision or in framing its remedy. Thus, there is no basis for implying, as does the dissent, some particular Board construction of the loss-of-status provision from the decision and order in *J. C. Penney* and "related cases."

Furthermore, we find no support for the dissenting position in the Supreme Court majority and concurring opinions which it cites. As for *Mastro Plastics, supra*, it dealt, as noted, with the applicability of 8(d) to an unfair labor practices strike; while *N.L.R.B. v. Lion Oil Company*, 352 U. S. 282, concerned that section's applicability to a strike during the term of a contract. Thus neither case involved the instant situation and neither was specifically concerned with the effect of 8(d)(3) upon the loss-of-status provision. Consequently, we do not believe that the general statements directed to the problems before the Court and relied upon by the dissent are useful in construing Section 8(d) with respect to the particular problem before us.

Decision and Order of the Board

been behind the Respondent's actions with respect to them is immaterial.¹⁵

In sum, we here decide that the Respondent did not violate Section 8(a)(3) and (1) by its conduct with respect to the strikers on and after June 8, 1961. Also as the strikers' employee status was lawfully terminated, it fol-

¹⁵ See footnote 10, *supra*.

Our colleague objects in his dissent to the fact that our construction interferes with the right to strike in a manner not *specifically* provided for in the Act. See, Section 13. However, the Board has found strikes unlawful or unprotected in situations where the Act does not specifically proscribe such strikes but where, however, important policy considerations deriving from the Act require such result. See, for example, *Budd Electronics, Inc.*, 137 NLRB 498, finding a strike in violation of a no-strike clause unprotected and *MacKay Radio and Telegraph Company, Inc.*, *supra*, holding unlawful a strike to compel an employer to violate the Act. Furthermore, we believe that Subsection 8(d)(3) was intended as a "specific" limitation on the right to strike. Thus, as Senator Taft observed in defending S 1126 which contained provisions substantially the same as those here under consideration: "We have done nothing to outlaw strikes for basic wages, hours, and working conditions *after proper opportunity for mediation*" (93 Cong. Rec. 3835, Apr. 23, 1947, emphasis supplied) and the events since the passage of the 1947 Act have demonstrated that compliance with Subsection 8(d)(3) has been an important adjunct in providing that congressionally intended "proper opportunity for mediation." In the second Report of the Joint Committee on Labor-Management Relations it is observed that the Federal Mediation and Conciliation Service "has been greatly assisted in this program [of preventing disputes] by the fact that under Section 8(d)(3), a party desirous of modifying or terminating its contract must notify the service 30 days before resorting to a strike or lockout. * * * In the days before the 30-day notice was required, strikes frequently occurred before the regional offices of the Service had any knowledge that there was a dispute." (Rept. 986, 80th Cong., 2d Sess., Pt. 3, p. 15). Clearly, our colleague's conclusion that employees may lawfully strike after 60 days but irrespective of the filing of 8(d)(3) notices goes far towards defeating the Congressional purpose of providing mediation to help avoid industrial strife.

Concurring Opinion of Frank W. McCulloch, Chairman

lows, and we find, that the Respondent's breaking off of negotiations with the union and its unilateral changes in working conditions did not violate Section 8(a)(5) and (1), as alleged. Accordingly, we shall dismiss the complaint.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D. C., June 28, 1963.

PHILIP RAY RODGERS,	Member
BOYD LEEDOM,	Member
GERALD A. BROWN,	Member
NATIONAL LABOR RELATIONS BOARD	

(SEAL)

Concurring Opinion of Frank W. McCulloch, Chairman

FRANK W. McCULLOCH, CHAIRMAN, concurring:

I concur in the result reached in this case. The strike engaged in by the discharged employees was unlawful under Section 8(d)(3) of the Act because of the Union's failure to give the 30 days notice therein required,¹⁶ and as such was an unprotected concerted activity for which the employees could validly be discharged. Together with the majority, I do not believe that the record substantiates a finding that the discharge action was in truth motivated by any other consideration. Hence, like Member Brown, I find it unnecessary to determine what the situation might have been

¹⁶ *Retail Clerks International Association, Local No. 1179, AFL, etc. (J. C. Penney Company)*, 109 NLRB 754; *Local Union 219, Retail Clerks v. N.L.R.B.*, 265 F. 2d 814 (C. A. D. C.).

Dissenting Opinion of John H. Fanning, Member

had the record established discriminatory motivation on some other basis. Nor do I find it necessary now to pass on the question of whether the employee "loss of status" penalty provision contained in the final sentence of Section 8(d) is applicable in the case of a strike preceded by compliance with the 8(d)(1) 60-day notice requirement but not by compliance with the notice requirement of 8(d)(3). The unprotected activity ground adverted to above is enough, without more, to support the dismissal order in which I join.

Dated, Washington, D. C., June 28, 1963.

FRANK W. McCULLOCH, Chairman
NATIONAL LABOR RELATIONS BOARD

Dissenting Opinion of John H. Fanning, Member

JOHN H. FANNING, MEMBER, dissenting:

This case involves essentially conflicting arguments concerning the construction and application of Section 8(d). Basically, the conflict revolves around the thrust and scope of the "loss-of-status" provision in that Section, and the extent to which Congress intended to inhibit the right of employees to engage in an economic strike.

In pertinent part, Section 8(d) provides that no party to a collective-bargaining agreement shall modify or terminate such agreement unless the party desiring such termination or modification

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, . . . ;

. . .

Dissenting Opinion of John H. Fanning, Member

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes * * * ;

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given * * * ;”

The penultimate sentence of this Section contains the “loss-of-status” provision which recites that

“Any employee who engages in a strike within the *sixty-day period specified in this subsection* shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act.* * * ” (Emphasis supplied.)

The Union in this case gave Respondent the requisite 60-day notice of termination as prescribed in Section 8(d)(1), and both the Union and the employees refrained from engaging in a strike during that period in obedience to the mandate of Section 8(d)(4). However, the Union failed to notify the Mediation services as outlined in Section 8(d)(3). After the 60-day period had elapsed, the employees struck. Despite the fact that, both grammatically and structurally, the “loss-of-status” provision interdicts strike action by employees solely during the 60-day period specified in Section 8(d)(1) and (4), my colleagues hold that, where a union fails to notify the Mediation agencies of the existence of a dispute within that 60-day period, the right of employees to strike is further forfeited until such time as their representative complies with Section 8(d)(3). I perceive no warrant, either in the statutory framework or

Dissenting Opinion of John H. Fanning, Member

legislative history of Section 8(d), for such a strained construction. Nor do I find support for such a view in decisional law.

In construing legislation, we are taught that it becomes "a judicial responsibility to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested."¹⁷ If the plain and unambiguous language of Section 8(d) can in any sense be said to leave a doubt as to the Congressional purpose in relating the "loss-of-status" clause exclusively of the 60-day period specified in Section 8(d)(1) and (4), the pronouncements of the courts and statements of legislative intent do not.

In defining the duty to bargain imposed upon employers and unions in Section 8(d), Congress sought to perfect a balanced accommodation of the right of employees to engage in concerted activities for their mutual aid and protection, and the expressed policy of substituting collective bargaining for economic warfare. In *Mastro Plastics Corp. v. N.L.R.B.*,¹⁸ the Supreme Court pointed out that it

"is the dual purpose of the Act (1) to protect the right of employees to be free to take concerted action as provided in Sections 7 and 8(a), and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions. Section 8(d) seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods, while Sections 7 and 8(a) seek to insure freedom of concerted action by employees at all times."

¹⁷ See *N.L.R.B. v. Lion Oil Co., et al.*, 352 U. S. 282, 297.

¹⁸ 350 U. S. 270, 284.

Dissenting Opinion of John H. Fanning, Member

To foster a climate in which parties to collective-bargaining agreements could thoughtfully and peacefully force succeeding agreements at the bargaining table, Congress fashioned a "natural renegotiation period" of 60 days prior to the expiration of existing contracts "to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation."¹⁹ To accomplish this end, it was made an unfair labor practice for either party to resort to such action during that period. But Congress also recognized that employees, in defiance of their union, might disrupt the orderly course of bargaining by engaging in a strike. It therefore warned that any employee who ceased work during this insulated period would lose whatever rights he possessed under the Act.

The specific relation of the "loss-of-status" provision to the 60-day period set out in Section 8(d) (1) and (4) was not the result of happenstance but of compromise. The opponents of the provision argued against its inclusion in that Section. They contended that any restriction on the right of employees to strike during the renegotiation period would impose an additional penalty upon them inasmuch as their bargaining representative was already foreclosed from taking strike action on pain of committing an unfair labor practice²⁰. While the argument did not succeed in

¹⁹ *Ibid.* at p. 286.

²⁰ S. Min. Rep. No. 105, Pt. 2, on S. 1126, 80th Cong., 1st Sess. 21: "Under the provisions of section 8 both unions and employers are required to bargain collectively. A violation of this requirement is made an unfair labor practice, subject to a cease-and-desist order from the Board. Clearly a strike or lockout during the 60-day period would constitute an unfair labor practice. We can see no reasonable grounds for discriminating against the employees by providing an additional penalty which will cause them to lose their status as employees under the National Labor Relations Act." And see Cong. Rec., Sen. p. 4156, Apr. 25, 1947.

Dissenting Opinion of John H. Fanning, Member

eliminating this legislative proposal, it did provoke the proponents of the clause to restrict its scope to the 60-day insulated period, for the legislative history of the proposal is literally punctuated with the equation of "loss-of-status" to that period²¹. Moreover, on the few occasions on which judicial authority has considered the scope of Section 8(d), it was made clear that the intrusion which the "loss-of-status" provision makes on employee strike action was limited to the 60-day period.²² In view of this, it is not

²¹ See e.g., S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 24: "Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the terminal date, if they desire to terminate or amend. Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing the old contract has the duty to notify the new Federal Mediation Service of the impasse. Should the notice not be given on time, * * * it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period. Any employee who engages in a strike *during the 60-day period* would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed." (Emphasis supplied): H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 35: "Any employee who engaged in a strike *within the 60-day period just described* [in Sections 8(d)(1) and (4)] lost his status as an employee of the particular employer for the purpose of sections 8, 9, and 10 of the act." (Emphasis supplied.)

²² See *N.L.R.B. v. Lion Oil Co., et al.*, *supra* at p. 303 where Justice Frankfurter, in a separate opinion, observed: "The loss-of-status clause alone is more favorable to the former Board's view, since it speaks of 'the sixty-day period specified in this subsection,' and, to be effective *under the present Board's construction*, this clause has to be understood as reading 'the period specified in paragraph (4).' Since the problem before us was not anticipated, it is not surprising that Section 8(d)'s legislative history offers little direct evidence that Congress did more than require a sixty-day wait-

(Continued on page 34a)

Dissenting Opinion of John H. Fanning, Member

surprising that my colleagues are unable to point to a single legislative or judicial reference which would support their assertion that such strike activity by employees is subject to proscription for a longer period if the notice to the Mediation agencies as required in Section 8(d) (3) has not been given.

There is, I think, an even more compelling reason why my colleagues' disregard of the plain words of Section 8(d) should cause concern. That Section seeks to further the dual statutory purpose of protecting the right of employees to engage in concerted activities and of fostering orderly collective bargaining, and, we are told, "A construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it"²³. Section 13 of the Act cautions that "Nothing in this Act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or

(Continued from page 33a)

ing period prior to bargaining strikes. "When the Joint Committee did note the problem in 1948, however, it adopted the *present Board's view of the statute and not that of the old Board*." (Emphasis supplied.) And see *Mastro Plastics Corp., et al. v. N.L.R.B.*, *supra*, where a majority of the court, after setting forth the 60-day period in Sections 8(d)(1) and (4), stated: "Section 8(d) thus seeks, during this natural renegotiation period, to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation. The final clause of Section 8(d) also warns employees that, if they join a proscribed strike, they shall thereby lose their status as employees. * * *" Justice Frankfurter, in his dissenting opinion in that case, related the "loss-of-status" provision to the 60-day period when he noted that "By reason of this new enactment, participating workers would not be engaged in a protected activity under Section 7 by striking for the most legitimate economic reasons *during the 60-day period*. The strike would be in violation of the provision of that section which says that during the period there shall be no resort to a strike." (Emphasis supplied.)

²³ *N.L.R.B. v. Lion Oil Co., et al.*, *supra* at p. 289.

Dissenting Opinion of John H. Fanning, Member

diminish in any way the right to strike, or to affect the limitations or qualifications on that right." (Emphasis supplied.) The right to strike is, of course, one of the most fundamental afforded to employees. In light of the affirmative emphasis which the Statute places upon the freedom of employee concerted action, and the command of Section 13 that the hand of restraint be placed upon any restriction on such action unless "specifically provided for," I believe that a limitation on the right of employees to strike which goes beyond the 60-day period specified in Section 8(d) (1) and (4) must be more explicit and clear before it can be said to have been intromitted in Section 8(d) (3)²⁴. For, under my colleagues' "parity of reasoning," the failure of a union to notify the Mediation Services, either because of inadvertence or in the belief that collective bargaining can be successfully concluded in the renegotiation period, may result in the forfeiture of the right to strike for weeks, or months, or even years after that period has elapsed. In my opinion, such a construction throws the concerted rights of employees into imbalance under the statutory scheme, and does little if anything to enhance true collective bargaining. If Congress has sought to relate the "loss-of-

²⁴ See *N.L.R.B. v. Lion Oil Co., et al.*, *ibid.*; *Mastro Plastics Corp., et al. v. N.L.R.B.*, *supra* at p. 287. And see *NLRB v. Eric Resistor Corp.*, — U. S. —, 53 LRRM 2121, 2127: "While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgement in exacting detail, e.g., §§ 8(b)(4), 8(d), by indicating the precise procedures to be followed in effecting the interference, e.g., § 10(j), (k), (l): §§ 2806-2810, Labor-Management Relations Act, and by preserving the positive command of § 13 that the right to strike is to be given a generous interpretation within the scope of the labor act. The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike."

Dissenting Opinion of John H. Fanning, Member

status" provision to each and every notice clause in Section 8(d), it could readily have done so. It has not. This is made abundantly clear by Judge Hays' observation in *Independent Union v. Procter & Gamble*, ed 6-17-63 312 F. 2d 181, 188 (C. A. 2) that " * * * the requirement of paragraph (3) [of 8(d)] that Federal and State agencies be notified is entirely independent of paragraph (4). There is no suggestion in the text that a failure to meet the notice requirements of paragraph (3) will have any effect on paragraph (4). The only notice mentioned in (4) is the 60-day notice of termination."

I am not unmindful of the decisions cited by the majority which hold that a union which fails to give the 30-day notice required in Section 8(d) (3) thereby violates Section 8(b) (3) of the Act. Nor have I disregarded the legislative purpose of requiring such notice—to invite the special assistance of Federal and State Mediation Agencies in the hope that the peaceful settlement of bargaining disputes will be thereby enhanced. However, I fail to see how these cases support my colleagues' view that employees lose their status and hence their right to strike during the period in which their union commits an unfair labor practice by failing to provide the notices outlined in Section 8(d) (3). For example, in *Retail Clerks International Association, Local No. 1179 (J. C. Penney Company)*²⁵, upon which my colleagues rely, the union had served the 60-day notice upon the company of its desire to modify its contract. Approximately 4 months later, the union and all employees struck without notification having been served on the Mediation Service under Section 8(d) (3). The Board found that the union violated Section 8(b) (3) by its failure to comply with this provision. It ordered the union to cease refusing to bargain with the company by failing to notify the Mediation agencies within 30 days after it had

²⁵ 109 NLRB 754.

Dissenting Opinion of John H. Fanning, Member

served notice upon the company of its desire to modify the contract. In effect, the Board ordered the union, as the exclusive bargaining agent of the employees, to bargain with the company. In my opinion, the result achieved in *Penney* and related cases²⁶ collides with the position my colleagues have taken here and presents an obvious anomaly. They now assert that strikers lose their status as "employees" if they engage in a strike whenever their union fails to serve the 30-day notice under Section 8(b) (3). It would therefore follow that, where as in *Penney* and the instant case, *all* employees engage in a strike under these circumstances, the union thereby ceases to be the majority representative and the Board is powerless to perpetuate a bargaining relationship²⁷. The forced continuation of such a relationship can only be justified if the union is in fact a majority union. And this fact can be established only if the strikers remain "employees" of the company. It seems to me that *Penney* and the related cases more appropriately belong in my camp.

There is yet another reason why I disagree with the result reached by my colleagues. They assert that, even without regard to the "loss-of-status" provision, the strikers were validly discharged because the strike was unlawful under Section 8(d) (3) and hence the strikers were engaged in an unprotected concerted activity. This is not a case where employees have struck the violation of a no-strike (e.g., *Budd Electronics, Inc.*, 137 NLRB 498) or to compel an employer to violate the Act (e.g., *MacKay Radio and Telegraph Company, Inc.*, 98 NLRB 740), decisions to which my colleagues advert to support their alternative thesis. In those cases, the strike was in direct support of

²⁶ E.g., *Brotherhood of Locomotive Firemen and Enginemen (Phelps Dodge Corporation, Morenci Branch)*, 130 NLRB 1147.

²⁷ See Sections 8(a)(5) and 9(a) of the Act.

Dissenting Opinion of John H. Fanning, Member

the illegal object which their union was pursuing. Here, the employees struck, not in furtherance of the Union's failure to give the 30-day notice under Section 8(d) (3), but to exert economic pressure upon Respondent to obtain a lawful collective-bargaining agreement. Their strike was therefore totally unrelated to their Union's violation of that Section. I fail to perceive how such a strike acquired a taint of illegality or how the employees' otherwise lawful conduct can be translated into unprotected concerted activity. If my colleagues' assertion is pressed to its logical conclusion, then all employee strike action, regardless how lawful its object or purpose, becomes unprotected whenever their union concurrently violates the Act. I submit that this conclusion lacks support both in the Statute and in decisional law.²⁸

Contrary to the majority, I conclude that the "loss-of-status" clause in Section 8(d) applies exclusively to strike action taken by employees during the 60-day period specified in Section 8(d) (1) and (4). I would therefore find that, having struck the Respondent after that period had expired, the economic strikers herein retained their status as "employees" within the meaning of the Act and did not engage in unprotected activity, and that Respondent violated Section 8(a) (3) by discharging them.²⁹ Accord-

²⁸ In the *Local Union 219* and *J. C. Penney* cases, upon which the majority relies, the unions were found to have violated Section 8 (b)(3) by their failure to give the requisite notices under Section 8(d)(3). While the Board and the court held that the unions had engaged in unfair labor practices and could be enjoined therefrom, there is no suggestion that the striking employees, who sought to obtain a lawful labor agreement, lost the protection of the Act by engaging in the strike.

²⁹ In view of this finding, I do not reach or consider the additional grounds relied upon by the Trial Examiner, and rejected by the majority, for finding that Respondent violated Section 8(a)(3) by discharging the strikers.

Dissenting Opinion of John H. Fanning, Member

ingly, I would order Respondent to reinstate them and make them whole for any loss of pay they may have suffered by reason of their discharge. I would also find that, as the strikers remained employees of the Respondent during the course of their strike, the Union retained its majority representative status³⁰. I would therefore order the Respondent, upon request, to bargain with the Union, provided the Union comes into compliance with the notice requirements set forth in Section 8(d) (3)³¹.

Dated, Washington, D. C., June 28, 1963.

JOHN H. FANNING,
Member.
NATIONAL LABOR RELATIONS BOARD.

³⁰ Respondent's sole defense to the refusal-to-bargain charge was predicated upon the Union's loss of majority status occasioned by the discharge of the strikers.

³¹ See *Retail Clerks International Association, Local No. 1179 (J. C. Penney Company)*, *supra*; *Brotherhood of Locomotive Firemen and Enginemen (Phelps Dodge Corporation, Morenci Branch)*, *supra*.

Intermediate Report of Trial Examiner

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

[SAME TITLE]

WILLIAM E. STATHAM, Esq., for the General Counsel.

JAMES E. YOUNGDAHL, Esq. (McMATH, LEATHERMAN, WOODS AND YOUNGDAHL), of Little Rock, Ark., for the Charging Party.

B. S. CLARK, Esq. (MEHAFFY, SMITH AND WILLIAMS), of Little Rock, Ark., and EDGAR E. BETHELL, Esq. (BETHELL AND PEARCE), of Fort Smith, Ark., for the Respondent.

MARTIN RAPHAEL, Esq., of New York, N. Y., for the Intervenor.

Before:

SYDNEY S. ASHER, JR., Trial Examiner.

On June 20, 1961, Local 270, United Furniture Workers of America, AFL-CIO, herein called the Union, filed charges in the above-entitled matter against Fort Smith Chair Company, Fort Smith, Arkansas, herein called the Respondent. On December 29, 1961, the General Counsel¹ issued a complaint and notice of hearing alleging that on or about

¹ The term General Counsel includes the General Counsel of the National Labor Relations Board and his representative at the hearing.

Intermediate Report of Trial Examiner

June 8,² the Respondent discharged 202 of its employees, and has since failed and refused to reinstate them, because they joined or assisted the Union or engaged in concerted activities or participated in a strike. It is further alleged that, since on or about June 9, the Respondent has refused to bargain with the Union upon request, although the Union was the statutory representative of the Respondent's employees in an appropriate unit. It is alleged that this conduct violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. Thereafter the Respondent filed an answer and an amended answer admitting that on and before May 31 the Union had been the representative of the Respondent's employees in an appropriate unit, and admitting that from on or about June 9 the Respondent had refused to bargain with the Union, but denying that on or after that date the Union was the bargaining representative of the employees. The answer further alleges that the refusal to bargain was justified by the fact that the Union instigated an illegal work stoppage in violation of Section 8(d)(3) and (4) of the Act. The amended answer also admits that, on or about June 8, the Respondent discharged certain employees because they were engaged "in an unlawful work stoppage." The amended answer further denied that the Respondent discharged certain other employees.

Pursuant to notice, a hearing was held before me on February 21 and 22, 1962, at Fort Smith, Arkansas. All parties were represented and participated fully in the hearing. United Furniture Workers of America, AFL-CIO, appeared and was permitted to intervene. The General Counsel amended his complaint to strike therefrom the

² All dates herein refer to the year 1961 unless otherwise noted.

Intermediate Report of Trial Examiner

names of 16 alleged dischargees.³ On or before April 16, 1962, all parties filed briefs, which have been duly considered.⁴

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

There is no dispute, and it is found, that the Respondent is, and at all material times has been, engaged in commerce as defined in the Act, and its operations meet the Board's jurisdictional standards;⁵ and that the Union is, and at all material times has been, a labor organization as defined in the Act.

A. FACTS

The Respondent and the Union have had bargaining relations since approximately 1940. From the inception of this bargaining relationship, contract negotiations were

³ The remaining 186 alleged dischargees are listed in Appendixes A and B attached hereto.

⁴ The General Counsel's brief on page 4 sets forth the details of the Union's membership meeting of June 1. However, the record shows that this was not evidence but instead was merely an offer of proof which was rejected. The General Counsel, on pages 11 and 12 of his brief, also argues that Weeks, a witness for the Respondent, was not credible because he could not remember Bearce's testimony. But the testimony of Condren, another witness for the Respondent, indicates that Weeks had left the hearing room before Bearce took the stand.

⁵ The Respondent is an Arkansas corporation with its place of business at Fort Smith, Arkansas, where it is engaged in the manufacture of furniture. The Respondent annually ships products valued at more than \$1,000,000 from its Fort Smith, Arkansas, plant directly to destination outside the State.

Intermediate Report of Trial Examiner

conducted by an employer's group called the Furniture Association, of which the Respondent was a member. In the contracts resulting from such negotiations, each company comprising the Furniture Association was a named party, and each signed the agreement. As a result of contract negotiations in 1957, two of the companies, the Respondent and Ballman-Cummings Furniture Company, jointly entered into a separate supplementary agreement with the Union described as a "stipulation." On October 15, 1958, the Union and the Furniture Association, which included the Respondent, executed a contract which provided, in part:

"ARTICLE XIV

TERMINATION

Section 1. This Agreement * * * shall run to and including October 14, 1960. Either party shall give to the other notice in writing at least sixty (60) days prior to said expiration date of its desire to amend or cancel this agreement on said expiration date. In the absence of such notice, this Agreement shall continue in effect for an additional year."

Prior to October 14, 1960, this contract was reopened by the Union in accordance with the notice requirements of Section 8(d) of the Act. On October 15, 1960, the Union and the Respondent agreed by letter as follows:

"Upon expiration of the Collective-Bargaining Agreement between Fort Smith Chair Company and United Furniture Workers of America, it is agreed * * * that the said agreement shall be continued in full force and effect without any change whatever, except as hereafter stated, through the 31st day of May 1961. The only change in said Agreement is

Intermediate Report of Trial Examiner

[here follows an agreement to increase base rates in certain instances, and an increase in the Respondent's contribution to the insurance plan].

Otherwise the contract shall continue in all respects through May 31, 1961 * * *."

On February 23, 1961, the parties further agreed by letter in part as follows:

"This letter is to confirm an understanding * * * reached in connection with the negotiations of the current contract which is to expire June 1, 1961. In view of the fact that * * * the contract by its terms expires June 1, [here follows an agreement regarding vacation pay]."

On March 27, a representative of the Union wrote to the Respondent in part as follows:

"On behalf of our organization, it is our desire to cancel the labor agreement between your Company, and our organization and to negotiate a new contract to take the place of the contract expiring June 1, 1961.

We herewith give you 60 days notice as provided in the Taft-Hartley-Bill, and we also, hereby give you 60 days notice as provided for in Article XIV of the existing labor contract * * * that the Union will consider the contract as terminating on * * * June 1, 1961. The Union will keep in effect the existing terms and conditions of employment until the expiration date of said contract, namely June 1, 1961.

* * *

It is our hope that we will have no difficulty in reaching a new and modified agreement."

Intermediate Report of Trial Examiner

Prior to June 1, neither the Federal Mediation and Conciliation Service offices in Saint Louis, Missouri, and Little Rock, Arkansas, nor the Arkansas Department of Labor received notices from the Union that a dispute existed between the Respondent and the Union in regard to the contract which was to expire on May 31.

The parties held negotiating sessions on May 29 and 31. The Union's chief spokesman was Louie Campbell, its business representative. The main spokesman for the Respondent were Edgar E. Bethell, Esq., its attorney, and John Ayers, its secretary-treasurer. Each side presented its demands. Among the Respondent's proposals was to add a phrase reading: "No employee has a vested right in any level of incentive earnings." This evoked a great deal of discussion. By noon on May 31 (1) the Respondent had agreed to the Union's demand that mother-in-law and father-in-law should be added to the definition of family in the holiday clause; (2) the Union had agreed to one of the Respondent's demands;⁶ (3) the Union had presented its "money demands" of a wage increase of 2 cents per hour "across the board" and an extra holiday, Christmas Eve; and (4) the Respondent had rejected these "money demands" on the ground that it had been losing money for over 4 years. After a luncheon recess bargaining resumed, and Campbell announced that the Union was withdrawing its "money demands" and offered to extend the "old" contract for another year, with the two changes already agreed

⁶ According to Campbell this was an addition to the contract providing that an employee should notify the Respondent, if possible, if he was not going to be able to report for work. Bethell and Ayers testified that this was a change in the method of presenting a new standard to an employee. I deem it unnecessary to resolve this conflict.

Intermediate Report of Trial Examiner

upon.⁷ After another recess, the Respondent presented six demands. These included the two changes already agreed upon, the controversial "no vested rights" clause, and several others. Campbell importuned the Respondent's representatives to withdraw the "no vested rights" clause on the ground that it might result in lower earnings and the employees would not accept it, especially when they had dropped their "money demands." Ayers was adamant on this subject, insisting that the Respondent's perilous financial position required that it "had to have some help before we could enter into a contract."⁸ After further discussion of the "no vested rights" clause, Ayers told Campbell "this was it, that's all there was, and to take it to the people and let them vote on it."⁹ Campbell replied that he could not recommend the Respondent's proposition to the Union's members.¹⁰ The meeting then ended.

⁷ This finding is based upon the credited testimony of Bethell and Ayers, corroborated by that of two members of the Respondent's bargaining team. Campbell testified that he offered an extension of the old contract *with or without* the two modifications already agreed upon. In this he was corroborated by two members of the Union's negotiating committee. Although all witnesses impressed me as sincere, I consider the memory of Bethell and Ayers on this subject more accurate than that of Campbell.

⁸ The quoted language is from Ayers' testimony. Bethell testified that the Respondent's spokesmen told the Union Committee that they regarded these clauses as "essential to having a contract."

⁹ The General Counsel's witnesses testified that Ayers added: "take it or leave it" and pounded the table; the Respondent's witnesses denied that Ayers used these words or that he pounded the table. I deem it unnecessary to resolve this conflict.

¹⁰ The Respondent's witnesses testified that Campbell added that if the Union's membership rejected the Respondent's proposition "we are going to start right back where we started and our offer is withdrawn." I do not consider it necessary to make a finding with regard to this alleged remark.

Intermediate Report of Trial Examiner

On the following morning, June 1, the Union held a membership meeting. A secret ballot was taken on the question: "Do you wish to accept the Company offer?" The result was overwhelmingly "No." On the same day most, if not all, of the Respondent's production employees struck the plant, and picket lines were established; the plant ceased production operations.

Another negotiating meeting was held on June 7 which was attended by a representative of the Federal Mediation and Conciliation Service. The parties' positions remained about the same. The Union's negotiators renewed their offer to extend the "old" contract for another year, with the changes already agreed to, but the Respondent refused. There was more discussion of the "no vested rights" clause, and Campbell asked "why didn't they just forget it * * * and then there would be no strike." Bethell offered to revise or rewrite the objectionable clause, and Campbell replied: "If you want to water it down some * * * maybe * * * we might buy it." A meeting was then scheduled for the following day.

At the meeting of June 7 Bethell learned for the first time that notices of the existence of a dispute had not been received by the Federal Mediation and Conciliation Service. On June 8 Ayers sent a telegram to Campbell which read:

"BECAUSE OF THE UNLAWFUL CHARACTER OF THE PRESENT WORK STOPPAGE AT FORT SMITH CHAIR COMPANY YOU ARE ADVISED THAT THE COMPANY DECLINES TO CONTINUE NEGOTIATIONS WITH LOCAL 270 OF THE UNITED FURNITURE WORKERS AND THAT THE EMPLOYMENT OF ALL PEOPLE WHO HAVE PARTICIPATED IN THE UNLAWFUL STRIKE IS TERMINATED."

There were no further negotiations. On the same day the Respondent sent to each production employee who had

Intermediate Report of Trial Examiner

been scheduled to work on June 1 (listed in Appendix A attached hereto) a letter which read, in part: "As a result of your participation in the illegal work stoppage * * * your services with this Company are terminated." At the same time the Respondent sent to each production employee who had not been scheduled to work on June 1 (listed in Appendix B attached hereto) a letter which read, in part:

"On June 1 our employees began a work stoppage. Our records reflect that you were not scheduled to be at work on that date. We, therefore, do not know whether you are participating in the strike * * * If you have not reported for work, or have not made arrangements for a leave of absence on or before Tuesday, June 13, we will assume that you are taking part in the strike, and your employment with the Company will be terminated."

On June 13 the plant resumed production operations and new employees were hired. Thereafter the Respondent made certain changes in its wage structure and incentive system without consulting the Union. The picketing continued through December 14. On December 15 Campbell wrote to the Respondent notifying it that the strike had been terminated and applying unconditionally for reinstatement on behalf of all the strikers. None of the strikers has been reinstated, but some of them have returned to work as new employees. (See Appendixes A and B.)

B. CONTENTIONS OF THE PARTIES AND THE ISSUE

The General Counsel maintains that the Union's strike was not designed to "terminate or modify" the contract and that therefore notice to the Federal Mediation and Conciliation Service under Section 8(d)(3) of the Act was unnecessary. It follows, urges the General Counsel, that the strike was an *economic strike* protected by Section 7

Intermediate Report of Trial Examiner

of the Act, and the discharges of 186 employees for engaging in the strike violated Section 8(a)(3) of the Act. The General Counsel also takes the position that the Respondent's telegram of June 8 constituted a refusal to bargain with the statutory representative violative of Section 8(a)(5) of the Act. The Union and the Intervenor agree with the General Counsel, but go even farther; they contend that the Respondent did not bargain in good faith during the sessions of May 29 and 31 and that therefore the strike was an *unfair labor practice strike*, to which Section 8(d)(3) of the Act does not apply.

The Respondent, on the contrary, insists that Section 8(d)(3) of the Act is applicable, and therefore the failure of the Federal Mediation and Conciliation Service to receive notice from the Union of the existence of a dispute made the work stoppage an *unprotected strike*. Under the last sentence of Section 8(d) of the Act, urges the Respondent, each individual who participated automatically lost his or her "status as an employee" and it follows that neither the discharges nor the refusal to bargain thereafter were violative of the Act.

It can thus be seen that the principal issue herein is a narrow one: Under the circumstances here present did the failure of the Federal Mediation and Conciliation Service to receive from the Union the notice described in Section 8(d)(3) of the Act remove the strike from the protection of Sections 7 and 13 of the Act, and automatically deprive the participants of their status as employees?

C. THE DISCHARGES

1. *The purpose of the strike*

On the entire record I am convinced, and find, that the parties bargained in good faith¹¹ on May 29 and 31 but

¹¹ The contrary contention of the Union and the Intervenor is rejected.

Intermediate Report of Trial Examiner

were unable to reach agreement on matters which were mandatory subjects of collective bargaining. At the end of the May 31 session the Union's negotiators were willing to extend the old contract for another year, with the two relatively minor changes already agreed to. But the Respondent insisted upon "relief" in the form of the addition of the "no vested rights" clause and other changes, including a restriction upon holding grievance meetings during working time. The Union's representatives resisted these changes. I am also convinced, and find, that what the Respondent was seeking constituted *modification* of the old contract.¹² Furthermore, there is abundant evidence that the major stumbling block to agreement was the Respondent's adamant insistence upon adding the "no vested rights" clause, and the Union's equally adamant refusal to add such a clause. This is not said critically, for unquestionably the parties had every legal right to so insist. But there is in my opinion no escape from the conclusion that the Respondent's demand, if acceded to, would have materially altered the contract, as earlier interpreted by the arbitrator.¹³ In sum, then, by the close of the May 31 meeting, the Union was willing to renew the old contract with changes already agreed upon, but the Respondent was

¹² Ayers testified as follows:

"Trial Examiner: In your opinion was the Company's attempt to get the grievance procedure after working hours an attempt to get a change in the contract?"

The Witness: It was a slight change, sir.

* * *

Trial Examiner: It wasn't a change of condition, but it was a limitation, was it not, that wasn't in the old contract?

The Witness: That is correct, sir. * * *

¹³ The fact that the Respondent had requested the arbitrator to reconsider does not aid the Respondent, because the contract provides: "All decisions of the Arbitrator shall be *final, conclusive* and binding upon all parties." (Emphasis supplied.)

Intermediate Report of Trial Examiner

not. The Respondent wanted additional changes, of a material nature, and to this the Union refused to agree.

Let us turn, then, to the strike. The vote of the Union's membership rejected the Respondent's final offer. Since the contract therefore expired, this was treated as a strike vote. In the light of the above, I conclude that the purpose of the strike from its inception was *to force the Respondent to abandon its insistence upon substantial changes in the contract*, particularly the "no vested rights" clause.¹⁴ This was still the purpose on June 7, when Campbell suggested that the Respondent "forget" its demand for the "no vested right" clause and added "then there would be no strike." It was thus the Respondent, rather than the Union, which was bent upon modifying the old agreement. Indeed, the Respondent unilaterally did so after June 13.

2. Conclusions

Section 8(d) of the Act, as amended, provides, in part, as follows:

" * * * where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party of the proposed termination or modification sixty days prior to the expiration date thereof. * * *

* * *

¹⁴ Although the Union's position on May 31 was that it would renew the old contract with the two changes already agreed to, it cannot seriously be contended that it struck to obtain these two minor changes. A union does not strike to obtain terms to which the employer has already agreed.

Intermediate Report of Trial Examiner

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, * * * and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract, for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * *

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended.

* * *

The notice requirements of Section 8(d)(1) and (3) do not apply to every strike. It has been held that they are inapplicable to unfair labor practice strikes.¹⁵ Nor do they apply to every economic strike, as the Respondent seems to argue. Of these requirements, the Supreme Court said in the *Mastro Plastics* case:

"The Board reasons that the words which provide the key to a proper interpretation of Section 8(d) with respect to this problem are 'termination or modification.' Since the Board expressly found that the instant strike was *not to terminate or modify* the contract * * * the loss of status provision of Section 8(d) is not applicable. We sustain that interpretation." (Emphasis in original.)¹⁶

¹⁵ *Mastro Plastics Corp., et al. v. N.L.R.B.*, 350 U. S. 270.

¹⁶ *Mastro Plastics Corp., et al. v. N.L.R.B.*, *supra*, at page 286.

Intermediate Report of Trial Examiner

Here, as in *Mastro*, the object of the strike was "not to terminate or modify" the contract. It follows that here, as in *Mastro*, the loss-of-status provision of Section 8(d) of the Act does not apply. The strikers were therefore engaged in a lawful economic strike protected by Sections 7 and 13 of the Act. It was accordingly a violation of Section 8(a)(1) and (3) of the Act for the Respondent on June 8, 1961, and later, to discharge the employees listed in Appendixes A and B attached hereto because they participated in such concerted activity. Moreover, these discharges (along with the refusal to bargain discussed below) unlawfully prolonged the strike and converted it from an economic into an unfair labor practice strike.

D. THE REFUSAL TO BARGAIN*1. The appropriate unit*

The complaint alleges, the answer admits, and it is found that at all material times all the Respondent's production and maintenance employees, excluding office clerical employees, foremen, inspectors who do no production work, timekeepers, salesmen, over-the-road truckdrivers and supervisors as defined in the Act constitute a unit appropriate for collective bargaining. This is the same unit agreed upon by the parties in their contract of October 15, 1958.

2. The Union's majority status

The complaint alleges that the Union is and at all material times has been the statutory bargaining representative of the employees in the unit described above. The amended answer admits that the Union was such representative on and before May 31, but denies that it remained in this status on or after June 1. The Respondent's theory seems to be that the Union's failure to comply with the notice requirements of Section 8(d)(3) and (4) of the Act

Intermediate Report of Trial Examiner

caused those who participated in the strike which began on June 1 to lose their status as employees; hence the Union thereby lost its majority status. However, it has been found above that the loss-of-status provision of Section 8(d) of the Act did not apply to this strike. It follows that the Union never lost the majority status it admittedly enjoyed on May 31.

3. The demand and the refusal

The complaint alleges that, since on or about June 9, the Union has requested the Respondent to bargain regarding the working conditions of the employees in the above-described unit, but that the Respondent has refused since then to recognize or bargain with the Union. The answer denies that the Union made any demand for bargaining since on or about June 9, but admits that thereafter the Respondent refused to bargain.

The record shows that the parties were in the midst of bargaining and had a session scheduled for June 8. The Respondent's telegram of that date, quoted above, abruptly broke off negotiations and automatically cancelled the scheduled session. A reading of this telegram makes it abundantly clear that any further request for recognition or bargaining would have been futile. Under these circumstances, no new demands by the Union were necessary to bring into play the statutory duty of the Respondent to continue negotiations then in progress.¹⁷ It is accordingly found that by dispatching the telegram of June 8 to the

¹⁷ No impasse had been reached then because the Respondent had agreed to rewrite the clause in question. Even if an impasse had been reached which conceivably might have permitted the Respondent to break off negotiations, this was not the reason set forth in the telegram. And while the telegram is phrased only in terms of declining to continue negotiations it is clear from its tenor that it constituted more, namely a refusal to recognize the Union's majority status, which of course is not justified by an impasse.

Intermediate Report of Trial Examiner

Union and by thereafter unilaterally changing the working conditions of its employees without prior consultation with the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

On the basis of the above findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Fort Smith Chair Company is, and at all material times has been, an employer within the meaning of Section 2(2) of the Act.

2. Local 270, United Furniture Workers of America, AFL-CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of the Respondent, excluding office Clerical employees, foremen, inspectors who do no production work, timekeepers, salesmen, over-the-road truckdrivers, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Local 270, United Furniture Workers of America, AFL-CIO, was on June 8, 1961, and at all times since has been, the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from Local 270, United Furniture Workers of America, AFL-CIO, as bargaining agent for the employees in the above-described unit on and after June 8, 1961, and by thereafter unilaterally chang-

Intermediate Report of Trial Examiner

ing the working conditions of employees in the above-described unit without prior consultation with the above-named labor organization, thereby failing and refusing to bargain collectively with the said labor organization as the exclusive representative of the employees in the above-described unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discharging the employees listed in Appendixes A and B attached hereto, thereby discriminating in regard to the hire and tenure of employment of its employees and discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By the above-described conduct the Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The above-described unfair labor practices, occurring in connection with the Respondent's operations, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, I make the following:

Intermediate Report of Trial Examiner

RECOMMENDATIONS

In my opinion, the unfair labor practices found stemmed not from a rejection of the collective-bargaining principle (there had been bargaining for many years) but solely from an interpretation of Section 8(d) of the Act which I have found to be erroneous. I therefore am convinced and find that there is here no danger that the Respondent will commit other unrelated unfair labor practices in the future. Accordingly, it will only be recommended that the Respondent cease and desist from the unfair labor practices found, or any like or related unfair labor practices.

Affirmatively it will be recommended that the Respondent, upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, and if an agreement is reached embody such understanding in a signed contract. It will further be recommended that the Respondent offer to the employees listed in Appendixes A and B attached hereto immediate and full reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, discharging if necessary any employee hired after June 8, 1961, when the economic strike was converted into an unfair labor practice strike.¹⁸ It will further be recommended that the Respondent make each of them whole for any loss of pay he or she may have suffered by paying to him or her a sum of money equal to that which he or she would normally have earned from December 14, 1961, the date of the unconditional offer to return to work, to the date of the offer of reinstatement, less his or her net earnings during such period. The backpay provided

¹⁸ See *General Drivers and Helpers Union, Local 662, etc. v. N.L.R.B. (Rice Lake Creamery Company, Intervenor)*. — F. 2d — (C. A. D. C.) May 3, 1962.

Intermediate Report of Trial Examiner

for herein shall be computed in a quarterly manner, as established by the Board.¹⁹ It will further be recommended that the Respondent preserve and make available to the Board or its agents all records needed to determine the amount of backpay due hereunder, and post the usual notices.

The General Counsel requests that the Respondent additionally be required to reimburse the discharged employees for interest computed at the rate of 6 percent per annum, commencing with the end of the first calendar quarter in which the discriminatory discharges were committed and each succeeding quarter until payment therefore is made or tendered. The General Counsel's brief convinces me that the request is a reasonable one, and I accordingly recommend that the Respondent reimburse the discharges for such interest.

It is therefore recommended that Fort Smith Chair Company, Fort Smith, Arkansas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging its employees from joining or engaging in activities on behalf of Local 270, United Furniture Workers of America, AFL-CIO, or any other labor organization, by discharging them, or refusing to reinstate them, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment.

(b) Announcing or putting into effect any changes, alterations or modifications in the wages, hours, or condi-

¹⁹ *F. W. Woolworth Co.*, 90 NLRB 289. In calculating backpay, whether to apply the wages and incentive standards existing on May 31, 1961, or those put into effect unilaterally by the Respondent after June 13, 1961, is a matter for determination at the compliance stage of this proceeding.

Intermediate Report of Trial Examiner

tions of employment of the employees in the unit described below, without first consulting with the above-named labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Offer to the employees listed in Appendixes A and B attached hereto immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered by them by reason of the discrimination against them.

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports necessary to compute the amount of backpay due hereunder.

(c) Upon request, bargain collectively with Local 270, United Furniture Workers of America, AFL-CIO, as the exclusive representative of the employees in the unit described below with respect to wages, hours, and other conditions of employment, and if any agreement is reached, embody such understanding in a signed contract. The appropriate unit is:

“All the Respondent's production and maintenance employees, excluding office clerical employees, foremen, inspectors who do no production work timekeepers, salesmen, over-the-road truckdrivers and supervisors as defined in the Act.”

Intermediate Report of Trial Examiner

(d) Post at its plant at Fort Smith, Arkansas, copies of the notice attached hereto marked Appendix C.²⁰ Copies of the said notice, to be furnished by the Regional Director for the Twenty-sixth Region, shall, after being signed by a representative of the Respondent, be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material.

(e) Mail copies of the said notice to all employees listed on Appendixes A and B, addressed to their last known addresses.

(f) Notify the said Regional Director, in writing, within 20 days from the receipt of this Intermediate Report, what steps Respondent has taken to comply herewith.²¹

It is further recommended that unless the Respondent shall, within 20 days after the receipt of this Intermediate Report, notify the said Regional Director, in writing, that it will comply with the foregoing recommendations, that the Board issue an order requiring the Respondent to take such action.

Dated at Washington, D. C.

SYDNEY S. ASHER, JR.,
Trial Examiner.

²⁰ If these recommendations are adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner." If the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision and Order."

²¹ If these recommendations are adopted by the Board, the words "within 10 days from the date of this Order" shall be substituted for the words "within 20 days from the receipt of this Intermediate Report."

Intermediate Report of Trial Examiner

APPENDIX A

PERSONS WHO RECEIVED LETTERS FROM RESPONDENT
DATED JUNE 8, 1961

Charley Abney	Jennie Casto
Ervin Adkins	E. R. Chadwick
Clifford Aldridge	Charles Chapman
Robert Anderson	D. C. Cherry
Frank Ballard	Jessie Coppinger
Travis Ballard ¹	Jim Crabtree
James Barker	Agnes Darter
Retha Barnard	Dwain Derrick
Charley Barnes	Will Doss
Eunice Bartlett	Velma Doyel
Jean Battles	Marvin Durham ¹
Mildred Battles ¹	Tracy Durham
Raymond Battles	Floyd Dustman
Johnny Beagle	Winfred Dustman
Clyde Bearce	Susie Earls
Harrison Beckham	Ray Easter
Everett Been	Ison Edwards
Billy Belt	Noah Edwards
Garrette Belt	William Eiland
Omer Blythe	Billy English
Conway Bowlet	Emmett Fleetwood
Roland Boyette	Frankie Freeman
Lee Brewer	Russell Freeman
Connie Brown	Elizabeth Friga
Irving Brown	Darrell Gallihar
Perry Brunk	Goldie Gilbert
Freddy Cagle	Johnnie Gilbert
J. E. Carr	Otis Gilliam

¹ Returned to work in August, September or December 1961 as a new employee.

Intermediate Report of Trial Examiner

Thomas Green	Martha McClendon
Gladys Harman	Elzie McDonald
Jimmy Harris	Rachel Meadors
Virgil Harvell	V. J. Mean
Ruth Hassell	Dorothy Milburn
Harlen Hawkins	Earl Moore
Herbert Hawkins ¹	Corthel Mongold
Gerald Hay	Clinton Morris
L. C. Hayes	Winfred Nelson
Billy Hesson ¹	Kenneth Nena
E. C. Hesson	Darrell Newton
Eula Hopkins ¹	Lilly Ohm
Leonard Howard	William Olander
Cecil Hubbard	Tommy Orsborne
James Hulsey	Raymond Patterson
Mildred Hunter	Eula May Pennington
Aaron Hydge	Susie Pinkerton ¹
Bessie Jiles	Henry Pitchford
Carl Jones	Agnes Pool ¹
Lennie Keck	Jasper Potts
Jimmy Kinnerson	Charles Proctor
Roy Kirby	William Radcliff
Henry Kusel	Esther Reavis
Alfred LaRue	Walter Reed
Clyde LaRue	William Rhodes
Jerry LaRue	Clifford Ridenoure
Lester Lovell	J. W. Riggs
Verna Lovell	Leo Roberts
Leonard Mankins	Clarence Robertson
Mary Martin	Eddie Robison
Jimmy Matlock	Jerry Rogers
Orlan Matlock	William Rucker
John Mayfield ¹	Lucille Ruckman

¹ Returned to work in August, September or December 1961 as a new employee.

Intermediate Report of Trial Examiner

Orville Satterfield	Elsie Treat
Eugene Schmalz	Zady Tucker
Larry Seabolt	Frank Vann
Olen Shafer	Clifford Vaughan
Ursula Shields	J. L. Vaughan
Jack Short	John Vaughan
Martha Sloss	Ulysses Vaughan
Richard Sloss	Jewell Vernon
J. C. Small	Jessie Wadkins
Dorothy Smith	N. S. Walkord
Bobby Sparkman ¹	Grace White
Donald Spradling	Jess White
Jewell Stallings	Charles Whithurst
Oscar Stapp	George Whitledge
Cecil Stephens ¹	Roy Whitsett
Harry Stephens	Harrison Willhite ¹
Joe Stevens	Herbert Willhite
Henry Stewart	James Williams
Louis Stroud ¹	Charles Wilson
Charles Swaim	Jack Wilson
Bertie Sweet	Johnny Wilson
Willie Sweet	Riley Wilson
Ferrell Tabor	Vesta Wilson
John Thomas	Lawrence Woodward
Claudie Tindall ¹	Eula Belle Young
Pleasant Todd	Harrison Young
Martin Toon	

¹ Returned to work in August, September or December 1961 as a new employee.

Intermediate Report of Trial Examiner

APPENDIX B

PERSONS WHO RECEIVED LETTERS FROM RESPONDENT DATED
AFTER JUNE 8, 1961

(Date letter was received is indicated after each name).

Olen Ballard	June 28, 1961
Alex Banning	July 17, 1961
Audra Dustman ¹	June 27, 1961
Martin Hatley	July 21, 1961
Jimmy Hix ²	July 17, 1961
Aline Petree	June 14, 1961
Essie Rhodes	June 27, 1961
Mary Scholze	June 14, 1961
Charles Spangler	June 27, 1961
A. L. Spence	November 16, 1961
Buster Whisenhunt	September 21, 1961

¹ Returned to work on December 26, 1961, as a new employee.

² Name spelled as amended at the hearing.

Intermediate Report of Trial Examiner

APPENDIX C

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, you are notified that:

WE WILL NOT discourage membership in Local 270, United Furniture Workers of America, AFL-CIO, or any other union, by discriminating against our employees in hire or tenure of employment or any term or condition of employment.

WE WILL NOT announce or put into effect any changes, alterations or modifications in the working conditions of the employees in the unit described below without first consulting with the above-named union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self organization, to form unions, to join or assist Local 270, United Furniture Workers of America, AFL-CIO, or any other union, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer to the following employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges enjoyed, and make them whole for any loss of pay suffered by them as a result of the discrimination against them.

Intermediate Report of Trial Examiner

Charlie Abney	Jim Crabtree
Ervin Adkins	Agnes Darter
Clifford Aldridge	Dwain Derrick
Robert Anderson	Will Doss
Frank Ballard	Velma Doyel
Olen Ballard	Marvin Durham
Travis Ballard	Tracy Durham
Alex Banning	Audra Dustman
James Barker	Floyd Dustman
Retha Barnard	Winfred Dustman
Charley Barnes	Susie Earls
Eunice Bartlett	Ray Easter
Jean Battles	Isom Edwards
Mildred Battles	Noah Edwards
Raymond Battles	William Eiland
Johnny Beagle	Billy English
Clyde Bearce	Emmett Fleetwood
Harrison Beckham	Frankie Freeman
Everett Been	Russell Freeman
Billy Belt	Elizabeth Friga
Garrette Belt	Darrell Gallihar
Omer Blythe	Goldie Gilbert
Conway Bowlet	Johnnie Gilbert
Roland Boyette	Otis Gilliam
Lee Brewer	Thomas Green
Connie Brown	Gladys Harman
Irving Brown	Jimmy Harris
Perry Brunk	Virgil Harvell
Freddy Cagle	Ruth Hassell
J. E. Carr	Martha Hatley
Jennie Casto	Harlen Hawkins
E. R. Chadwick	Herbert Hawkins
Charles Chapman	Gerald Hay
D. C. Cherry	L. C. Hayes
Jessie Coppinger	Billy Hesson

Intermediate Report of Trial Examiner

E. C. Hesson	William Orlander
Jimmy Hix	Tommy Orsborne
Eula Hopkins	Raymond Patterson
Leonard Howard	Eula Mae Pennington
Cecil Hubbard	Aline Petree
James Hulsey	Susie Pinkerton
Mildred Hunter	Henry Pitchford
Aaron Hude	Agnes Pool
Bessie Jiles	Jasper Potts
Carl Jones	Charles Proctor
Lennie Keck	William Radcliff
Jimmy Kinnerson	Esther Reavis
Roy Kirby	Walter Reed
Henry Kusel	Essie Rhodes
Alfred LaRue	William Rhodes
Clyde LaRue	Clifford Ridenoure
Jerry LaRue	J. W. Riggs
Lester Lovell	Leo Roberts
Verna Lovell	Clarence Robertson
Leonard Mankins	Eddie Robison
Mary Martin	Jerry Rogers
Jimmy Matlock	William Rucker
Orlan Matlock	Lucille Ruckman
John Mayfield	Orville Satterfield
Martha McClendon	Eugene Schmalz
Elsie McDonald	Mary Scholze
Rachel Meadors	Larry Seabolt
V. J. Mean	Olen Shafer
Dorothy Milburn	Ursula Shields
Earl Moore	Jack Short
Corthel Mongold	Martha Sloss
Clinton Morris	Richard Sloss
Winfred Nelson	J. C. Small
Kenneth Nena	Dorothy Smith
Darrell Newton	Charles Spangler
Lilly Ohm	Bobby Sparkman

Intermediate Report of Trial Examiner

A. L. Spence	John Vaughan
Donald Spradling	Ulysses Vaughan
Jewell Stallings	Jewell Vernon
Oscar Stapp	Jessie Wadkins
Cecil Stephens	N. S. Walkord
Harry Stephens	Buster Whisenhunt
Joe Stevens	Grace White
Henry Stewart	Jes White
Louis Stroud	Charles Whithurst
Charles Swaim	George Whitledge
Bertie Sweet	Roy Whitsett
Willie Sweet	Harrison Willhite
Ferrell Tabor	Herbert Willhite
John Thomas	James Williams
Claudie Tindall	Charles Wilson
Pleasant Todd	Jack Wilson
Martin Toon	Johnny Wilson
Elsie Treat	Riley Wilson
Zady Tucker	Vesta Wilson
Frank Vann	Lawrance Woodward
Clifford Vaughen	Eula Belle Young
J. L. Vaughan	Harrison Young

WE WILL, upon request, bargain collectively with Local 270, United Furniture Workers of America, AFL-CIO, as the exclusive representative of the employees in the unit described below with respect to wages, hours and other working conditions, and if an agreement is reached put it in the form of a signed contract. The appropriate unit is:

“All our production and maintenance employees, excluding office clerical employees, foremen, inspectors who do no production work, timekeepers, sales-

Intermediate Report of Trial Examiner

men, over-the-road truck drivers and supervisors
as defined in the National Labor Relations Act."

All our employees are free to become, remain or refrain
from becoming members of the above-named or any other
union.

FORT SMITH CHAIR COMPANY
(Employer)

Dated

By
(Representative) (Title)

Transcript of Testimony

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SIXTH REGION

Case No. 26-CA-1094

[SAME TITLE]

Chancery Courtroom,
Sebastian County Courthouse,
Fort Smith, Arkansas,
Wednesday, February 21, 1962.

Pursuant to notice, the above-entitled matter came on
for hearing at 10:00 o'clock a. m.

Before:

SYDNEY S. ASHER, JR., Trial Examiner.

Appearances:

B. S. CLARK, Esq. (of Mehaffy, Smith & Williams), 1100
Boyle Building, Little Rock, Arkansas, appearing on
behalf of Fort Smith Chair Company, Employer.

EDGAR E. BETHELL, Esq. (of Bethell & Pearce), 107 Pro-
fessional Life Building, Fort Smith, Arkansas, ap-
pearing on behalf of Fort Smith Chair Company,
Employer.

JAMES E. YOUNGDAHL, Esq. (of McMath, Leatherman,
Woods & [2] Youngdahl, 1330 Tower Building, Little
Rock, Arkansas, appearing on behalf of Local 270,
United Furniture Workers of America, AFL-CIO.

MARTIN RAPHAEL, Esq., 165 Broadway, New York 6,
New York, appearing on behalf of United Furniture
Workers of America, AFL-CIO.

Colloquy of Trial Examiner and Counsel

WILLIAM E. STATHAM, Esq., 722 Falls Building, Memphis, Tennessee, appearing on behalf of the General Counsel, Twenty-Sixth Region, National Labor Relations Board.

[4] PROCEEDINGS

Trial Examiner: The hearing will come to order. This is a formal hearing before the National Labor Relations Board in the matter of Fort Smith Chair Company and Local 270, United Furniture Workers of America, AFL-CIO, Case No. 26-CA-1094.

The Trial Examiner conducting this hearing is Sydney S. Asher, Jr. Will the representatives of the various parties please state their appearances for the record? For the General Counsel?

Mr. Statham: William E. Statham, 722 Falls Building, Memphis, Tennessee.

Trial Examiner: For the Charging Party?

Mr. Youngdahl: For Local 270, McMath, Leatherman, Woods & Youngdahl, by James E. Youngdahl, 1330 Tower Building, Little Rock, Arkansas, and Martin Raphael, 165 Broadway, New York City, for the International Union, United Furniture Workers of America, AFL-CIO.

Trial Examiner: Are you representing the Local here?

Mr. Raphael: Yes, sir.

Trial Examiner: And for the Respondent?

Mr. Clark: For the Respondent, Mehaffy, Smith & Williams, and B. S. Clark, 1100 Boyle Building, Little Rock, Arkansas; and Edgar E. Bethell, Professional Building, Fort Smith, Arkansas.

Trial Examiner: Now, for the purpose of receiving [5] registered mail, which will be the main representative for the Union?

Colloquy of Trial Examiner and Counsel

Mr. Youngdahl: It doesn't make any difference.

Mr. Raphael: If your Honor please, I should like to appear on behalf of the International Union, if I may.

Trial Examiner: You move to intervene?

Mr. Raphael: Yes, sir.

Trial Examiner: Let me take care of this other first, Mr. Raphael. Hold that for just a moment, please. Now, it doesn't make any difference who gets the service? There will always be courtesy copies to every attorney who enters an appearance, but our customary practice is only to have formal service on one. Who wants to get formal service for the Respondent?

Mr. Clark: Mehaffy, Smith & Williams, B. S. Clark.

Trial Examiner: Fine. Now, will you make your motion now?

Mr. Raphael: Yes. On behalf of the United Furniture Workers of America, AFL-CIO, I respectfully move that we be given the opportunity and privilege to intervene. In that connection, I may say, Mr. Examiner, that our participation will not be extensive, lengthy, or in way different from the participation of Mr. Youngdahl on behalf of the Local.

Trial Examiner: Is there any objection to the motion?

Mr. Clark: Mr. Raphael's intervention, I must say, is of no surprise to us. However, is Mr. Raphael, by his intervention, [6] making his International Union a party to this proceeding?

Trial Examiner: As an intervenor, yes.

Mr. Clark: As an intervenor?

Trial Examiner: Yes.

Mr. Clark: All right.

Trial Examiner: Are you objecting to it or not?

Mr. Clark: No objection.

Trial Examiner: Is there any objection on the part of the General Counsel?

Mr. Statham: No.

Colloquy of Trial Examiner and Counsel

Trial Examiner: In the absence of objection, the motion to intervene is granted.

I would like to call the attention of the parties to certain formal matters before we start. The Official Reporter makes the only official transcript of these proceedings. All citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any litigation. Proposed corrections to the transcript should be submitted either by way of stipulation or motion to the Trial Examiner for his approval.

All matters spoken in the hearing room while the hearing is in session will be recorded by the official Reporter unless the Trial Examiner specifically directs an off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed [7] to the Trial Examiner rather than to the Official Reporter.

Automatic exceptions will be granted to all adverse rulings and, upon appropriate order, objections and exceptions may be permitted to stand to an entire line of questioning. During the course of the hearing, the Trial Examiner may ask questions of the witnesses. All counsel should feel free to object to any such questions in the same manner and for the same reasons as he would object to similar questions on the part of opposing counsel.

All exhibits offered in evidence must be in duplicate. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering the exhibit to submit a copy before the close of the hearing. If such copy is not submitted and the filing thereof has not, for good reason, been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected. Documents once admitted into evidence cannot be returned to the original owners except

Colloquy of Trial Examiner and Counsel

where arrangements are made by appropriate motion or stipulation for the substitution of copies for the originals.

Any party is entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript. Any party is also entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions. [8] The Trial Examiner will fix a time for such filing.

No smoking will be permitted during the hearing.

Are you ready to proceed?

Mr. Clark: Mr. Examiner, I would like to ask one question, if I may.

Trial Examiner: Yes.

Mr. Clark: I would like to ask the Intervenor whether the Intervenor adopts all of the allegations contained in the Complaint by his intervention.

Mr. Raphael: Well, I don't know whether I am required to respond to this.

Trial Examiner: Not required to, but you can if you want.

Mr. Clark: Why isn't he required to?

Trial Examiner: Because the Intervenor is not a party to the Complaint. He hasn't signed the Complaint.

Mr. Clark: The Intervenor stands in the same status as the parties to this proceeding.

Trial Examiner: Yes, he is a party.

Mr. Clark: Yes, sir. Is he allowed to bring up any new issue?

Trial Examiner: No, he is not allowed to amend the Complaint, no. I wouldn't permit the Intervenor to amend the Complaint.

Mr. Clark: That's all I want to know.

Trial Examiner: Are you satisfied now?

[9] Mr. Clark: Yes.

Colloquy of Trial Examiner and Counsel

Mr. Raphael: I assure you I do not have any disposition, plan or program to amend the Complaint, and I shall let the matter rest with that statement.

Trial Examiner: Fine, thank you.

Mr. Raphael: Yes, sir.

Trial Examiner: It is not the function of an intervenor to enlarge the issues, but I thought you asked whether he subscribed to the Complaint. All right now, I think we are clear on the matter, aren't we?

Mr. Clark: Yes, sir.

Trial Examiner: Are you now ready to resume?

Mr. Statham: Yes, sir. At this time I offer into evidence formal papers. They have been marked for identification as General Counsel's Exhibits 1(a) through 1(j), inclusive, Exhibit 1(j) being an index and description of the entire exhibit. This exhibit has already been shown to all parties.

Trial Examiner: Is there any objection to the receipt in evidence of General Counsel's Exhibit 1(a) through 1(j)?

Mr. Clark: Yes, sir, we object—well, state it differently, we do not object to the documents as listed in the index and description of formal documents, but we make an objection in this respect, that we believe there are some documents that should be included in the formal documents that are not.

Trial Examiner: Have you taken this up with the General [10] Counsel?

Mr. Clark: No, sir. For example, the original charge that was filed in this matter was dismissed by the Regional Director, and a Letter of Dismissal was mailed to the parties. Thereafter, the charging party made exceptions and the matter was, of course, taken up with the Board in Washington. The Regional Director, of course, was over-

Colloquy of Trial Examiner and Counsel

ruled and the Complaint was issued. I think all of that should be a part of the record in this case.

Trial Examiner: Are you planning to include that?

Mr. Statham: No, sir, I think it's immaterial.

Mr. Clark: We think it's material. It constitutes the record.

Trial Examiner: Do you want to offer it as your exhibit?

Mr. Clark: I would be happy to at the proper time.

Trial Examiner: All right.

Mr. Raphael: We have no objection to this document.

Trial Examiner: You have received copies of all the various documents in this exhibit, have you not?

Mr. Clark: Yes, sir.

Trial Examiner: Do you have any objection then to these documents being received in evidence without prejudice to your rights to implement them or to offer other documents?

Mr. Youngdahl: No, sir.

Trial Examiner: Is there any objection on the part of [11] the Intervenor?

Mr. Raphael: No objection.

Trial Examiner: Any objection on the part of the charging party?

Mr. Youngdahl? A. No, sir.

Trial Examiner: In the absence of objections, General Counsel's Exhibits 1(a) through 1(j) are received in evidence.

(Thereupon, the documents heretofore marked General Counsel's Exhibits 1(a) thru 1(j) for identification were received in evidence.)

Mr. Statham: At this time, I would like to make an oral motion to amend the Complaint.

Trial Examiner: Amend it orally?

Mr. Statham: Yes, sir, as I have advised the parties previously I intended to do. The only paragraph which I

Colloquy of Trial Examiner and Counsel

intend to amend is Paragraph 11. I would like to amend it as follows:

“On or about June 8, 1961, the Respondent discharged the employees named below on the dates set opposite their names.”

Now, I want to make my motion in reference to the original paragraph in regard to these names. I am going to strike certain names in this list in the Complaint.

Trial Examiner: Before you do that, I don't understand the first sentence. As it reads in the original, it says [12] these people—

Mr. Statham: I beg your pardon. I was reading the—let me strike my original motion and start at the beginning. “The Respondent discharged the employees named below on the dates set opposite their names.”

Trial Examiner: That makes sense.

Mr. Statham: Right. Now, I am going to strike certain employees from this list of employees in the original paragraph 11. Others I am going to change the dates. In other words, I am going to insert a date by their name. Those I don't change means the date will remain the same, as June 8th. I think that is the best way and easiest way of doing it, rather than going through each name.

Mr. Bethell: Mr. Examiner, is what Mr. Statham is doing—as I understand it, what he is proposing to do here, Mr. Examiner, is to adopt the Respondent's Answer which sets out specifically the names of the individuals and the action taken and the dates in reference to them?

Trial Examiner: I can't tell whether that is his intent or not.

Mr. Bethell: We have discussed this, of course, before this hearing. Am I correct about that, Mr. Statham?

Mr. Statham: That's right, in a sense, but it is not entirely correct. I would rather make the motion this way.

Colloquy of Trial Examiner and Counsel

Trial Examiner: Let him make his motion and let's see what [13] it is first.

Mr. Statham: I am going down this list of names here, and—

Trial Examiner: Where you don't mention the names, it automatically means that is June 8th?

Mr. Statham: Yes, sir. In other words, if I don't mention an employee's name, that means it is June 8th, right.

Olen Ballard, the date set opposite his name should be July 28, 1961. The name of Mae Ballard should be stricken from the Complaint. Alex Banning, that date should be July 17, 1961. Strike the name of Lois Barrow from the Complaint. Strike the name of Jess Caldwell from the Complaint. Strike the name of Paul Clark. The date set opposite the name Audra Dustman should be June 27, 1961. Strike the name of F. M. Gentry from the Complaint.

The date set opposite the name of Martha Hatley should be July 21, 1961.

Trial Examiner: What is that name again?

Mr. Statham: Martha Hatley—H-a-t-l-e-y, July 21, 1961. Strike the name of Robert Hyde from the Complaint.

Oh, and then I am going back to one thing I omitted. Jimmie "Hicks" in the Complaint should be "Hix".

Trial Examiner: A change in spelling only?

Mr. Statham: Yes, sir, change in spelling, and then the date set opposite his name is July 17, 1961. Then strike the [14] name E. J. Lewis from the Complaint. Also strike from the Complaint the name Arnes Lovell. Then strike from the Complaint the name of Emogene McConnell. Strike from the Complaint the name of James Moody. The name of John Peters should be stricken from the Complaint.

The date set opposite Aline Petree should be June 14, 1961. The date set opposite the name of Essie Rhodes should be June 27, 1961. The name of Thel Richmond should be stricken from the Complaint. Mary Scholze, the

Colloquy of Trial Examiner and Counsel

date set opposite her name should be June 14, 1961. Strike the name of—

Trial Examiner: What was that date?

Mr. Statham: June 14, 1961. Strike the name of Wendell Smith from the Complaint. The date set opposite Charles Spangler should be June 27, 1961. The date set opposite the name of A. L. Spence should be November 16, 1961.

Trial Examiner: Would you mind repeating that last one?

Mr. Statham: A. L. Spence, the date is November 16, 1961. Strike the name of Aline Stockton from the Complaint. Strike the name of David Tidwell from the Complaint. The date set opposite the name of Buster Whisenhunt should be September 21, 1961. Strike the name of Fred Williams from the Complaint.

That completes my motion.

Trial Examiner: Are there any objections to the motion?

Mr. Clark: No objection.

[15] Trial Examiner: Does the Union have any objection?

Mr. Youngdahl: No, sir.

Mr. Raphael: No, sir.

Trial Examiner: In the absence of objections, the motion is granted. Now, this, I take it, will require a new answer. I dare say you don't have to answer to the names that were stricken. I mean to the charged dates; do they conform to the changed dates in the Answer?

Mr. Clark: Yes, sir.

Trial Examiner: In every respect?

Mr. Clark: Yes, sir.

Mr. Statham: And I might say the motion is intended to conform to those dates in the Answer.

Trial Examiner: What about James Moody? Oh, he is taken out, isn't he?

Colloquy of Trial Examiner and Counsel

Mr. Statham: Yes.

Trial Examiner: So in every respect, then, it does conform, and there is no need then for a new Answer?

Mr. Clark: We don't believe so.

Trial Examiner: Very well. And since you had advance notice of this, there is no necessity for additional time?

Mr. Clark: No, sir.

Trial Examiner: Thank you. You may proceed.

Mr. Statham: At this time, Counsel for the General Counsel would like to offer into evidence a stipulation signed [16] by the charging party and the Respondent and the counsel for General Counsel. The attorney for the Intervenor has inspected the stipulation. I offer this stipulation in evidence.

Trial Examiner: Should it be marked?

Mr. Statham: Yes, sir, it is marked already, sir, as General Counsel's Exhibit 2.

Trial Examiner: Is there any objection to the receipt in evidence of General Counsel's Exhibit 2?

Mr. Youngdahl: No objection.

Mr. Raphael: No objection.

Trial Examiner: In the absence of objections, the stipulation is received in evidence.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

Trial Examiner: I think, gentlemen, before we proceed any further, it would be advisable for me to read through this rather lengthy document in order to be advised of the issues, or would it just be necessary to read, at this point, the first two pages only?

Mr. Statham: I think the first two pages might well be sufficient.

Trial Examiner: I think I would probably be able to do that without a recess, if you will bear with me for a moment.

Colloquy of Trial Examiner and Counsel

[17] Mr. Clark: Respondent moves for a short recess in order to check the exhibits to the Stipulation against its own records.

Trial Examiner: Can you do it in five minutes?

Mr. Clark: I believe so.

Mr. Bethell: I don't believe we can. I don't believe we have the originals of this in the courtroom. I thought we had, but I don't believe we do.

Trial Examiner: Is ten minutes enough?

Mr. Bethell: May I make a suggestion that we check this during the lunch hour? I don't believe anything is going to happen in the meantime which would prejudice anybody, and rather than take the Examiner's time at this point—

Trial Examiner: Maybe that would be better. There are a lot of people in the courtroom as witnesses, and so forth, and I think that we ought to continue.

Mr. Bethell: We reserve this right, if the Trial Examiner please. We had agreed that certain documents would be attached as exhibits to this Stipulation, but we did not, prior to this moment, see the copies which the General Counsel has offered, and they are not duplications, as such, of the official documents. I don't mean to infer they aren't the same language, but they are not duplications of the originals, and we would like the opportunity to check them.

Trial Examiner: You will have ample opportunity to check [18] them, Mr. Bethell, during the lunch period. You don't need to do this now, do you?

Mr. Bethell: That was my suggestion, that we could check this during the lunch hour.

Trial Examiner: Yes. Of course, anything that is received in evidence of that sort is with the understanding that, if it later develops there is some inaccuracy, that it can always be taken care of by appropriate motion. You

Colloquy of Trial Examiner and Counsel

are not prejudicing your right to do that now. All right, gentlemen, I am ready now after a hasty reading. I take it the motion for a recess has been withdrawn?

Mr. Clark: Yes, sir, we withdraw our motion for a recess.

Mr. Statham: May we have a five-minute recess, and I apologize? It is a technical problem.

Trial Examiner: Very well, we will have a five-minute recess at this time.

(A short recess was taken.)

Trial Examiner: The hearing will come to order then.

Mr. Statham: I have some further documents which I would now like to introduce in evidence by way of stipulation. First, marked as General Counsel's Exhibit 3, I offer into evidence a letter dated October 15, 1960, to Louie Campbell, Business Representative of the charging party in this case, signed by Bethell & Pearce over the signature of Edgar E. Bethell, and also bearing the signature of John Ayers, and [19] further bearing the signature of—the acceptance signatures of Louie Campbell and Elmer Bost and Clyde LaRue, all of whom will be identified throughout this proceeding.

Trial Examiner: What is this exactly?

Mr. Statham: Well, it is a letter, which is self-explanatory. In other words, it is suggesting various things and then it is signed as accepted by the charging party.

Trial Examiner: I see.

Mr. Statham: And it is self-explanatory in the letter. And while I am offering this in evidence, I would also ask all parties to stipulate that copies may be received in lieu of the original, and that by way of reservation that at noon more legible copies will be substituted for the ones which I now have, which the Respondent has stated it wants to do. I offer in evidence this document marked Exhibit 3.

Colloquy of Trial Examiner and Counsel

Trial Examiner: Is there any objection to the receipt in evidence of General Counsel's Exhibit 3?

Mr. Clark: I would like for counsel to state the purpose for the introduction of the document.

Mr. Statham: Well, its purpose is to get into the record the contract as it existed between the parties. I mean as it existed at the time the negotiations commenced on May 29, 1961, in this case.

Mr. Clark: We offer no objection.

Trial Examiner: Any objection on the part of the charging [20] party or the Intervenor?

Mr. Youngdahl: No.

Mr. Raphael: No objection.

Trial Examiner: In the absence of objections, General Counsel's Exhibit 3 is received in evidence, and General Counsel is granted permission to withdraw the original and submit in lieu thereof legible copies for that purpose. The original is released from the custody of the official record. I want it kept in the hearing room, however, during the course of the hearing.

Mr. Statham: This isn't the original. I believe they have the original and they are going to make copies.

Trial Examiner: All right.

Mr. Statham: The Respondent I mean.

Trial Examiner: All right.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.)

Mr. Statham: I would like to now offer in evidence a document marked General Counsel's Exhibit No. 4, which is a letter dated February 23, 1961, to Mr. Louie Campbell, Business Representative of the charging party in this case, from Bethell & Pearce, over the signature of Edgar E. Bethell; also signed by Mr. John Ayers with a notation on the document. I would like to have leave to introduce more legible copies at [21] noon.

Colloquy of Trial Examiner and Counsel

Trial Examiner: These two copies you have handed me are not even alike.

Mr. Statham: The problem there is the photostat. It was hard to pick up the notation, and that is why I want to correct that at noon.

Trial Examiner: Is there any objection to the exhibit?

Mr. Youngdahl: No, sir.

Mr. Raphael: No objection.

Mr. Clark: We do want it understood it is offered for the same purpose as the previous exhibit.

Mr. Statham: That's right.

Mr. Clark: No objection.

Trial examiner: All right, it will be received in evidence as General Counsel's Exhibit 4, in the absence of objections, and the same procedure is granted in regard to the substitution of copies for the original.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 4 for identification was received in evidence.)

Mr. Statham: I now offer in evidence a document marked as General Counsel's Exhibit No. 5, which is a letter dated March 17, 1961, to Mr. Louie Campbell, Business Representative of the charging party, from Bethell & Pearce, over the signature of Edgar E. Bethell, and bearing the signature of [22] Louie Campbell under the word "Accepted".

Trial Examiner: Is there any objection to the receipt in evidence of General Counsel's Exhibit 5?

Mr. Youngdahl: Not for the charging party.

Mr. Raphael: No objection.

Mr. Clark: No objection by the respondent, with the understanding it is offered for the same purpose as the previous two exhibits.

Louie Campbell—for General Counsel—Direct

Trial Examiner: The document is received in evidence and the same procedure will be followed with regard to the substitution of legible copies.

(Thereupon, the document heretofore marked as General Counsel's Exhibit No. 5 was received in evidence.)

Mr. Statham: I would like to call Mr. Louie Campbell to the stand, please.

LOUIE CAMPBELL, a witness being called by and on behalf of the General Counsel, having first been duly sworn, was examined and testified as follows:

Direct Examination:

Trial Examiner: State your name and address.

The Witness: Louie Campbell, 923½ Garrison Avenue, Fort Smith, Arkansas.

By Mr. Statham:

Q. Mr. Campbell, what is your occupation, [23] please?

A. I am Business Representative of Local 270, United Furniture Workers of America, AFL-CIO.

Q. And how long have you been Business Agent of this Union? A. Almost eight years.

Q. And in your capacity as Business Agent of this Union, do you negotiate contracts with the employers whose employees are represented by this Union? A. Yes, sir.

Q. And for how many years have—strike that. Have you also engaged in contract negotiations during your tenure as Business Agent representative of this Union with Fort Smith Chair Company? A. Yes, sir.

Q. For how many years have you engaged in contract negotiations with Fort Smith Chair Company? A. Myself, almost eight years.

Louie Campbell—for General Counsel—Direct

Q. Now, it has been stipulated between the parties the last contract between—I mean, as shown by the document introduced by the parties, the last contract between your Union and Fort Smith Chair Company expired on May 31, 1961. Is that correct? A. Right.

Q. When was the first negotiated meeting in regard to this expired contract held? A. On May 29, 1961.

[24] Q. And where was it held? A. Ward Hotel.

Q. And could you state what time of day this meeting was held? A. About 10:00 o'clock.

Mr. Clark: I object to any further questions concerning any negotiating sessions on May 29th, for the reason that the Complaint is as to the refusal to bargain in good faith from on or about June 9th, or June 8th, 1961, and, for that reason, I can't see that these negotiating sessions are material here.

Trial Examiner: Is it your contention, Mr. Statham, that the Company refused to bargain on this session of May 29th?

Mr. Statham: No, sir. There is no allegation in the Complaint, that's true, that there was a refusal to bargain on this date. However, I think what occurred at these meetings is very relevant, sir, in showing the reason for the work stoppage as alleged in the Complaint. It is essential background for that.

Trial Examiner: Is there any objection to it going in as background?

Mr. Clark: Oh, we have no objection from the standpoint of background information.

Trial Examiner: I will let it in for that purpose.

Mr. Raphael: May I be heard briefly on this question? I would suggest that the evidence concerning these meetings [25] be permitted to go into

Louie Campbell—for General Counsel—Direct

the record without the confinement as background, because, as the testimony will later develop, I would suggest that it will show a wider latitude of significance for the issues than mere background.

Trial Examiner: Well, apparently the General Counsel wants to put it in for that, Mr. Raphael. I am going to limit it to that since that is the purpose for which it is put in.

Mr. Statham: I do hesitate on this. I mean if it comes to that, the phrase "background", I don't know what that encompasses entirely. I will say that it is the General Counsel's position that there was—I mean according to the allegations in the Complaint, there is no alleged unfair labor practice having occurred on May 29th.

Trial Examiner: I think that is the same thing. You are putting it not in as proof that an unfair labor practice occurred during that session, but—

Mr. Statham: That's true.

Trial Examiner: Therefore, it is background.

Mr. Statham: Yes, sir, with that explanation.

Mr. Clark: Going ahead a little bit, I know that Mr. Statham will be getting into a negotiating session that occurred on May 31st and, of course, I intend to make the same objection when he—

Trial Examiner: And I'll make the same ruling.

Mr. Clark: All right.

[26] Trial Examiner: I think you said you had no objection to it going in as purely background?

Mr. Clark: Yes, sir.

Trial Examiner: All right. Answer the question, Mr. Campbell, if you can remember what the question was.

Mr. Statham: I believe he has answered it.

Louie Campbell—for General Counsel—Direct

By Mr. Statham:

Q. Who represented the Union at this meeting, Mr. Campbell? A. Well, myself, Elmer Bost, Clyde LaRue, Clyde Bearce, Mr. Kinnerson and Mr. Vaughan.

Q. Vaughan? A. Yes, Vaughan. And also Gillam—Otis Gillam, and D. C. Cherry.

Q. Was a Mr. Stephens there? A. Harry Stephens.

Q. Where is Jim Kinnerson at the present time? A. He is in the Air Force some place. I don't know just where, but he was called into the Air Force.

Q. Is he in this area? A. I heard he was in Oklahoma.

Q. Where is Mr. Stephens at the present time? A. He is in Lubbock, Texas, working for the L. H. Fence Company.

Q. Who represented the Company at the May 29th meeting? A. Mr. Ed Bethell, John Ayers, Charlie Christy, Mr. Martin, [27] Billy Weeks, Mr. Dondren, and Mr.—I can't remember this guy's name.

Q. Mr. Spearman? A. Spearman, yes, the engineer.

Q. And all of these men who represented the Company at this May 29th meeting, are they still employed by the Company? A. Yes, sir.

Q. Now, what occurred at this May 29th meeting? A. Well, we give the Company our proposals in writing—I mean orally. They give us theirs in writing. So we discussed those proposals back and forth with one another until noon, 12:00 o'clock.

Q. And then you adjourned for lunch at noon, I take it? A. Yes, sir.

Mr. Statham: May we go off the record for just two minutes, please? There is a stipulation I think we can enter into at this time and save some time.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Louie Campbell—for General Counsel—Direct

Mr. Statham: Mr. Campbell has testified that during the morning session of the May 29th meeting the Union presented certain oral proposals to the Company. By way of stipulation, I would like to read those oral proposals in evidence now.

Trial Examiner: Is this the proposed stipulation?

[28] Mr. Statham: Yes, sir. The parties have agreed to stipulate, quote:

"1. Article XII, Section 6. Add to Item 4 language to provide that whenever a foreman tests a standard, the man who normally performs the work will be present, along with a Union representative.

"2. Article XII, Section 6. Amend Item 3 to limit a foreman to making one unit for experimental or developmental purposes.

"3. Article VI, Section 5(b). Change days in paragraph 1 from five to eight; in paragraphs 2, 3 and 4 from five to 20; and in paragraph 5 enlarge definition of family to include the employees' in laws. In the next succeeding paragraph dealing with tardy allowance, increase the allowance from 30 minutes to one hour.

"4. Amend the general provision of the stipulation in paragraph 6 to make it applicable to dropped numbers.

"5. Article IV, Section 5(a). Insert in first sentence after 'one day or less,' the words 'in any one week'."

Now, would the Respondent stipulate those are the oral proposals presented to the Respondent at the May 29th morning session?

Mr. Clark: We will stipulate that constitutes a summary of the oral proposals made by the Union at the May 29th meeting.

Louie Campbell—for General Counsel—Direct

[29] Mr. Youngdahl: We will so stipulate.

Trial Examiner: Thank you, gentlemen. The stipulation is received.

Mr. Statham: Now, by way of stipulation, as General Counsel's Exhibit 6 I offer into evidence the written proposals, copies of the written proposals, presented by the Respondent to the Union at the morning session of the May 29th meeting, as testified to by Mr. Campbell.

Trial Examiner: Is there any objection to General Counsel's Exhibit 6?

Mr. Youngdahl: No objection.

Mr. Raphael: No objection.

Mr. Clark: No objection.

Trial Examiner: In the absence of objections, General Counsel's Exhibit No. 6 is received in evidence.

(Thereupon, the document heretofore marked as General Counsel's Exhibit No. 6 for identification, was received in evidence.)

By Mr. Statham:

Q. Mr. Campbell, you testified that at the May 29th meeting you adjourned for lunch at approximately 12:00 o'clock. Was there another session held that some afternoon on May 29th? A. Yes, sir.

Q. And was the meeting at the same place? A. Yes, sir.

[30] Q. And approximately what time did it reconvene? A. About 1:00 o'clock.

Q. And did the same people represent the Union as in the morning session? A. Yes, sir.

Q. Did the same people represent the Company as in the morning session? A. Yes, sir.

Louie Campbell—for General Counsel—Direct

Q. Now, would you relate what occurred during this afternoon session of May 29th? A. The afternoon session consisted of about the same thing as the morning. We talked about each other's proposals and in that session we was able to agree on one each. We agreed upon one for the Company and they agreed upon one of ours, and we just talked about the proposals that afternoon.

Q. All right. Would you explain the two propositions which were agreed upon, please? A. Well, we agreed upon the Company's proposal that on unreported absence, that an employee should report, if possible, if he wasn't going to be able to work that day or the next day.

Q. All right, and what was the other? A. They agreed to give us the mother-in-law and father-in-law on the sick—on the holiday clause.

Q. You mean on the funeral? [31] A. Yes, funeral—off for funeral.

Q. And then, if I understand correctly, would it be correct to say that the Union made one concession in regard to the report of absence, if possible, and the Company made one concession in regard to a proposal made by the Union for adding in-laws to the funeral leave? Is that correct? A. Yes, sir.

Q. Was anything said at this meeting in regard to when the parties would meet again for another negotiating meeting? A. Yes, sir, we agreed to meet upon the 31st because the 30th was Memorial Day, so we agreed to meet on the 31st of May.

Q. 1961, of course? A. Yes.

Q. And was there a meeting then held on May 31, 1961? A. Yes, sir.

Q. And was—and where was this meeting held? A. Ward Hotel.

Q. And approximately what time did the meeting start that day? A. I believe it started at 9:00 o'clock that morning.

Louie Campbell—for General Counsel—Direct

Q. And was the Union represented by the same people at this meeting or were there additional or less people? A. No, we had the same people.

Q. The committee was the same? [32] A. Yes, sir.

Q. What about the company? Did the same people represent the company at this meeting? A. Yes, sir.

Q. Now, would you relate what occurred during this May 31st meeting? A. Well, we got back in that morning and went over the proposals, and talked to them nearly all morning and didn't make any more concessions on either side, and so just before noon, on the 31st, we give the Company our money proposal at noon where they could study it through the noon hour.

Q. And what was that proposal? A. Two cents across the board and one additional holiday, which we asked for Christmas Eve.

Q. And did the Company make any comment in regard to that proposal? A. Well—

Q. Before lunch I mean. A. I don't believe they made any before lunch.

Q. Now, did any—I believe you said you adjourned for lunch? A. Yes, sir.

Q. Was there any discussion between the Union Committee in regard to the negotiations during the lunch adjournment? A. Yes, there were some. We talked about—

[33] Mr. Clark: I object to what they talked about.

The Witness: Well, we just—

Trial Examiner: Just a minute. You are moving to strike that part of the answer?

Mr. Clark: Beg pardon?

Trial Examiner: You are moving to strike that part of the answer?

Mr. Clark: I am objecting to this testimony as being hearsay.

Louie Campbell—for General Counsel—Direct

Trial Examiner: Well, I don't think it is, Mr. Clark. I think he can summarize what was said.

Mr. Clark: All right. This, of course, was not in the hearing room—not in the meeting room. This was at lunch, as I understand it.

The Witness: Lunch time.

Trial Examiner: Oh, this was lunch time?

Mr. Clark: Yes, sir.

Trial Examiner: Oh, I will sustain the objection. I misunderstood. I think this is hearsay as far as the Company is concerned what they discussed out of the session.

Mr. Statham: Well, if I may point out to you, he is testifying as to what he has personal knowledge of what was said.

Trial Examiner: Yes, but it is not binding on the Company. It is not material what they discussed during lunch.

[34] Mr. Clark: And self-serving, also, if you please.

Trial Examiner: I will sustain the objection on the ground it is immaterial.

Mr. Statham: If you care to hear me out, please, the reason I am introducing this evidence is to show the purpose of the Union's change of position after the lunch adjournment, merely in order to show their motive for doing something.

Trial Examiner: Well, you said you were introducing this as background to begin with, so why are you going into motive for doing something? This was only put in for background. I will sustain the objection.

Mr. Raphael: Mr. Examiner, will you hear me briefly?

Trial Examiner: Yes, sir.

Louie Campbell—for General Counsel—Direct

Mr. Raphael: I submit this evidence may turn out to be of importance and perhaps incisive importance when considered logically in relation to the allegations of the Complaint, with reference to the strike. Now, if a Union Committee discusses among itself during the negotiations what they propose to do, or their evaluation of the negotiations up to that time, and shortly thereafter there is a strike and, if your Honor please, that the contract was up, or to be up that very night—

Trial Examiner: The 31st?

Mr. Raphael: Yes, the 31st, and the negotiations—and the next day a strike occurred, then I would think that you and [35] the Board would want to know what the judgment and what the proposals were of the Union Committee, especially in the light of Section 8(d), in light of the defense, and in the light of all the issues here. I recognize that it superficially looks as though it were hearsay, but also it has more valency to it, more logical connections to it, than mere blanket description of hearsay under the issues here.

Trial Examiner: Well, I excluded it not on hearsay, but as immaterial. I will adhere to my ruling, but I think, in order to protect your motion, Mr. Raphael, I will give you and the General Counsel the right to make an offer of proof through this witness while he is on the stand so you will protect your rights. You can make an offer of proof if you want. If you desire to do that by question and answer rather than by statement, then indicate when you are finished, or you can do it by statement.

Mr. Statham: I will do it by way of question and answer.

Trial Examiner: All right. Please indicate then when you are finished.

Louie Campbell—for General Counsel—Direct

Mr. Statham: Yes, sir.

Trial Examiner: You may ask the questions now of the witness on your offer of proof.

By Mr. Statham:

Q. Mr. Campbell, during the lunch adjournment on May 31, 1961, did the Union Committee have any [36] discussion among themselves in regard to the course of the negotiations and its plan for its proposals during the afternoon session of the May 31, 1961, meeting? A. Oh, we discussed—

Q. Answer yes or no. A. Yes.

Q. Would you explain what that discussion was? A. Well, we discussed the financial conditions of the Company, that they had told us at different times that the Company was in bad shape and we extended the contract prior to that for eight months, and still claimed to be in bad shape. So we—so it looked like that we wasn't going to get any money at all, the way everything was a-going, so we decided that evening that before we adjourned to take it to the people, that we would withdraw our wage proposals at that time. So we was already set at noon to do that without taking any time because the time was short, and that is what—

Q. Well, would you further explain—make it clear as to what you intended to do? A. We intended to withdraw, ask the Company if they would withdraw their proposals and we would withdraw ours, including the wage increase, and take the old contract for another 12 months as was, with the changes, with the two changes that we had agreed upon, one for each, with or without the changes, whichever the Company choose. That was what we discussed at [37] the lunch hour, and I believe that was about it.

Louie Campbell—for General Counsel—Direct

Q. And had a local company here by the name of Fort Smith Couch and Bedding Company recently signed a contract with your Union? A. Yes, sir.

Mr. Clark: Excuse me. Have you finished with your—

Mr. Statham: No, sir, this is part of the offer of proof.

By Mr. Statham (Continuing):

Q. And what kind of a wage agreement was reached with that company? A. Well, in wages, we had to give the Company a ten per cent decrease in wages because they were some 35 to 40 cents higher on the plant wide average than most of the upholstering shops in the area, so they couldn't sell their product, and so the people wasn't getting any work and that is why we had to.

Q. Did that have anything to do with the general business conditions of the furniture companies here in this area, too? A. For the past two years at that time none of the furniture factories seemed to be a-doing too good. We could tell it by the way the people were working and the way the Company talked at that time that business was bad.

Q. All right, sir.

Mr. Stratham: That completes my offer of proof.

Trial Examiner: The offer of proof is rejected, particularly the part concerning an entirely different

[38] manufacturer, which I didn't even know was going to go in the offer of proof. The offer of proof is rejected.

Louie Campbell—for General Counsel—Direct

By Mr. Statham:

Q. During these negotiations, were you aware of what had been done recently in the way of your Union signing a contract with Fort Smith Couch and Bedding Company herein Fort Smith.

Mr. Clark: Objection.

Trial Examiner: Sustain the objection.

Mr. Statham: I would like to make an offer of proof and apologize for being repetitious.

Trial Examiner: This is going awfully far afield, but I don't suppose I can deny you the right to make an offer of proof.

Mr. Statham: I don't mean to be adamant on this, but after all the evidence is in you may see why—

Trial Examiner: Can you make it by just a statement on the record?

Mr. Statham: Yes, sir, I can. If the witness were allowed to testify, he would testify in response to the question, to which the objection has been sustained, that his Union in April of 1961 negotiated a contract with Fort Smith Couch and Bedding Company, in which the Union agreed to a ten cent—excuse me—a ten per cent decrease in wages as a result of higher wages at this Company than those prevailing in the area, and also due to the fact that the business [39] of the furniture companies in this locality was purportedly poor.

Trial Examiner: I will reject the offer of proof in its entirety.

By Mr. Statham:

Q. Mr. Campbell, approximately what time did the meeting readjourn for the afternoon session on the 31st?

A. You mean in the evening? You mean after lunch?

Q. Yes. A. I would say somewhere around 3:30.

Louie Campbell—for General Counsel—Direct

Q. And were the same people there on behalf of the Union as previously? A. Yes, sir.

Q. And were the same people there on behalf of the Company as previously? A. Yes, sir.

Q. What occurred during the afternoon session, Mr. Campbell? Would you please relate that? A. Well, after we came back in the afternoon, our people get off at 4:15 down there, and we wanted to get ahold of our people and notify them what to do, because the contract was up that night at midnight, so we kind of rushed the thing, and there wasn't too much going on. So we told the Company somewhere around 3:30 our problems of getting the people up there to vote them, and so on and so forth, so we asked the [40] Company—we give the Company this proposal of ours, as I explained we discussed during the lunch hour, and we told the Company if they would give us a proposal in writing for the old contract for another year, and with the changes agreed upon or without them, whichever they choose, we would take it to the people and that would assure them of a contract for another year.

Q. What did the Company say in that regard? A. Well, the Company didn't make no comment at that time, but they went out, and I suggested that they go out and give us a proposal. They went out and come back in with a written proposal.

Q. All right. What else was said? A. Before they—before we adjourned?

Q. Yes, sir. Was anything said in regard to the Union's proposal? A. We asked them to give us that proposal in writing, that we would recommend it to the people and we would have a contract for another 12 months. And then they give us a proposal just before we adjourned.

Q. What did they say about your proposal, Mr. Campbell, if anything? A. I have already—I don't know what you mean.

Louie Campbell—for General Counsel—Direct

Q. Did they turn down your proposal or did they accept your proposal, or did they merely give a counter proposal, or was [41] anything else done? A. Well, when we give them the money proposal at first, they told us they didn't have any—couldn't give any increase.

Q. All right. Then when you offered to renew the existing contract for another year, what did they say in that regard, if anything? A. Well, as well as I can remember, they didn't say too much about it. There wasn't very much said, only that—I told them that time was getting late and if they would drop their proposals we would drop ours and drop the money, and if they would give us a proposal in writing that the old contract for another 12 months, with the two proposals agreed upon, with them or without, whichever they choose, that we would recommend it to the people and they would have a contract for another 12 months.

Q. All right. Then did they come back with a written proposal? A. They came back with a written proposal.

Q. What did the Union say in regard to their written proposals, if anything? A. Well, they handed me the proposals. They had three proposals in there and they still had used the one about the invested rights, that no employee had any invested right in the incentive earnings. That is the one we were fighting, the one we didn't want. So I talked to Mr. Ayers and I said, [42] "John, we asked you to come in with a proposal of—that we would drop all of our proposals if you would drop yours, except the ones agreed upon, and bring us in a proposal on the old contract for another year, and now then you stuck those in there again, the invested rights proposal, you stuck that in there again," and I said, "my people won't buy it, and we can't take it to them because these people ain't a-going to do that, so I ask you to take that out and forget that, and lest's just take the old contract for another year, extend it

Louie Campbell—for General Counsel—Direct

for another 12 months." Well, he says, "We have got to have that in there. That is the Company's offer. Take it to them." I begged Mr. Ayers and went over the same thing, and I said, "Mr. Ayers," I says, "let's don't have no strike, let's get a contract for another 12 months." I said, "Let's forget that one and take it out." He kind of got a little agitated because I was more or less begging him, but I felt like I should, so he says, "That is the Company's final offer. Take it to them. Take it or leave it."

Mr. Statham: May we go off the record for a few minutes for another stipulation, to save time?

Trial Examiner: Off the record:

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Statham: Mr. Campbell has just testified that the Company, toward the conclusion of the afternoon session on [43] May 31st, came back and made certain written proposals. By way of stipulation, I would like to read those proposals of the Company into evidence at this time.

Trial Examiner: They are in writing?

Mr. Statham: Yes, sir.

Trial Examiner: Proposed stipulation?

Mr. Statham: Yes, sir.

Trial Examiner: All right.

Mr. Statham: "1. Revise current contract to fit one company and incorporate letter of March 17, 1961, regarding retroactive figuring of earnings when no standard available.

"2. Add mother-in-law and father-in-law to holiday clause.

"3. Add to the discussion clause, discussion shall consist of method to be followed, the standard time and/or pieces are required for standard.

Louie Campbell—for General Counsel—Direct

“4. Add to the stipulation no employee has a vested right in any level of incentive earnings.

“5. Section 11. The Shop’s Steward Committee shall consist of not more than three employees and will be allowed not to exceed one hour’s time during working hours in each week for the purpose of presenting grievances. Employees serving on shop Steward’s Committee will be compensated at their base rate of pay.

“6. When it is necessary for an employee to be absent [44] from work, he should notify the Company as soon as practical and advise expected time of return to work.”

Mr. Youngdahl: The charging party so stipulates.

Mr. Clark: Respondent so stipulates.

Mr. Raphael: Yes.

Trial Examiner: Thank you, gentlemen. The stipulation is received.

By Mr. Statham:

Q. What, if anything, occurred on June 1, 1961, Mr. Campbell? A. Well, we sent the Shop’s Stewards down that evening to notify the people to be at the hall by 8:00 o’clock the next morning, on June 1st. I don’t know the exact time the meeting was called to order by Brother Bost, and he did call the meeting to order and he opened the meeting by prayer, and he read the proposals off to the Company—I mean to the employees, and then he asked the Committee to talk some on it, and some of them did.

Q. Now—

Mr. Clark: Mr. Examiner, I object to this testimony as being hearsay.

Trial Examiner: Are you moving to strike the answer?

Lowie Campbell—for General Counsel—Direct

Mr. Clark: Yes, sir.

Trial Examiner: What is the materiality of what went on?

Mr. Statham: Certainly, it is not hearsay in any sense [45] of the word.

Trial Examiner: What is the materiality?

Mr. Statham: The materiality is that this is a meeting at which the strike vote was taken. It shows the purpose of the strike. Certainly, I have been in several hearings where this evidence was brought out. I know of no other way to show the purpose of the strike other than what occurred on the strike vote meeting.

Trial Examiner: Oh, there are other ways to show it.

Mr. Clark: I will withdraw my objection.

Trial Examiner: Very well. Thank you. In absence of the objection—the motion to strike being withdrawn—the answer will stay. You may continue, Mr. Campbell.

A. (Witness, continuing) Well, after the Committee said a few words, some of them—I don't know whether they all did or not. I couldn't remember because it has been so long. I got up and then explained the proposal of the Company again, after Mr. Bost read it, and I told the people that if they had taken the contract with that clause in, and I was only speaking of one, that is, the incentives, the one I was really talking about, that they could cut them down to the base rate plus 20%. If they were so a-mind to, they could cut their wages as much as 50 cents, or a dollar, an hour.

Q. I think it is necessary for you to make clear what proposal you are talking about, Mr. Campbell. [46] A. That is the invested right of incentive for the employees, is what I am talking about. So I told the people that no-

Louie Campbell—for General Counsel—Direct

body wanted a strike, that I didn't like to strike, and I knew they didn't like to strike, but I wanted to point out to them just what could happen, and I wanted them to study it over and weigh it for what it was worth, that I didn't know the circumstances they had, their circumstances, and if they voted to strike it might be a long time, that they might have to strike until it got fall, and that I didn't do the voting. I said, "You people are the ones to do the voting, but be sure and weigh it and weight it for what it is worth and make your own decisions and vote the way you feel that is the best for you." So then someone got up—they opened a discussion for discussions, Mr. Bost did, after I sat down.

Mr. Clark: I now object to any further testimony as being immaterial. I can't see it bears on these issues in any way. I don't think we need all the details of what everybody said.

Trial Examiner: If you want to show the strike vote was taken and the result of the strike vote, I will let you do that. I assume there is no objection to that?

Mr. Clark: No objection.

Mr. Statham: This is a crucial part of the General Counsel's case in that the reasons the employees went out on strike, I think, is very important. I think the discussion [47] which preceded the strike vote goes to show what the employees had in their minds, what they had discussed, what had led up to the strike vote.

Trial Examiner: I will adhere to my ruling. I will sustain the objection but, due to the fact you seem to feel it is very important, I will let you make an offer of proof.

Mr. Statham: I don't want to belabor this beyond what is proper, but I would like to point out

Louie Campbell—for General Counsel—Direct

that, for example, in unfair labor provisions I think there are several cases which—

Trial Examiner: Well, the issue here is that it was an economic strike. There is no dispute on that?

Mr. Statham: What is that, sir?

Trial Examiner: That it is an economic strike. There is no contention it was an unfair labor practice—

Mr. Statham: Well, there is no allegation in the Complaint that they had refused to bargain in June—excuse me—that they had refused to bargain until June 8th. There is no allegation in the Complaint that they refused to bargain until June 8th.

Trial Examiner: That's right.

Mr. Statham: But I do think the purpose for the strike is, nevertheless, important in regard to whether or not notices had to be given under Section 8(d) of the Act.

Mr. Clark: Right there, Mr. Trial Examiner, the [48] stipulation has been that notices were not given, and I don't think that counsel for the General Counsel can go behind that stipulation.

Trial Examiner: No, but I understand he is trying to say that notices weren't necessary. He admits they weren't given in the stipulation.

Mr. Clark: All right, sir.

Trial Examiner: Let me look at the Act for just a moment.

Mr. Clark: All right, sir.

(Trial Examiner examines Act.)

Trial Examiner: All right, I will listen to arguments now. Mr. Raphael, I believe you indicated you wanted to be heard?

Mr. Raphael: Yes. If the Examiner please, I think that the evidence proposed through this

Louie Campbell—for General Counsel—Direct

witness is highly important on the issues, as we see them, and I suppose if it goes in as an offer of proof you would consider the offer of proof as evidence if you change your mind. But then the—

Trial Examiner: If the Board reverses me, yes.

Mr. Raphael: Yes, but we are not looking that far ahead, of reversing you or anything of that sort. I am just speaking logically as I see it. Here you have a strike, and the nature and motivations behind that strike, the purposes and objectives of that strike have an incisive importance to the [49] question whether or not compliance with Section 8(d) was a condition precedent to the exercise of the right to strike, or whether non-compliance with it or non-receipt of the notice to the Mediation Board, or the Federal Mediation Board, was significant. Now, we say you can't find out the purpose of the strike unless you get this evidence; and, if you won't do that, you can't find out whether, as the Company says, Section 8(d) must be complied with, or whether, as I assume the Board says,—the General Counsel to the Board is saying—that under the special circumstances here our compliance with Section 8(d) was not necessary. Therefore, I submit that we ought to have the full record in order to resolve that issue.

Trial Examiner: Mr. Raphael, where in Section 8(d) is there any mention of purpose of the strike?

Mr. Raphael: There is nothing there. Your Honor.

Trial Examiner: I couldn't find anything and that is why I am troubled by their question of why is it important to get the purpose of this strike. As I read 8(d), one of the things that is important to find out is whether or not the Union "terminated or modified" the contract.

Louie Campbell—for General Counsel—Direct

Mr. Raphael: Yes. If the purpose of the strike, Mr. Examiner, is to terminate or modify, then Section 8(d) applies. The purpose of the strike is neither to terminate nor to modify, so Section 8(d) does not apply. Therefore, if "A" [50] says one thing and "B" says another, if "B" says the opposite, that is, if the Board says Section 8(d) may not apply, or need not apply, depending upon what the purpose of the strike was, then I think it would be a serious omission to say that this evidence is not admissible, is not material, is not relevant. I think that might do some harm to the possibility of resolving this very important issue, and I don't think the evidence—and I agree, I don't think that we need that vast amount of detail as to what happened at the strike meeting—and I know you are familiar with the general pattern of those things. But here you have a nicety of distinctions which will later be developed in the course of briefs and arguments, which I think this kind of testimony has some relationship to. There is more here than meets the eye in terms of Section 8(d) and all that sort of thing which is a great test of metaphysics by itself.

Trial Examiner: Yes. As I understand Mr. Clark's position, he is not objecting to proof that a strike was voted on.

Mr. Clark: No, sir.

Trial Examiner: I ruled it would go no further than as background. Now I will hear from Mr. Clark.

Mr. Clark: I would just like to ask Mr. Raphael to clarify one point. Is there any contention here that the Company was guilty of any unfair labor practice at this time?

[51] Mr. Raphael: Well, since—

Louie Campbell—for General Counsel—Direct

Mr. Clark: Are you contending this was an unfair labor practice strike?

Trial Examiner: Well, that was already asked and answered. I asked the General Counsel that very question the last time you objected, and General Counsel stated on the record that the Complaint does not allege any unfair labor practice prior to June 9th, and he is not amending that. His contention is that the unfair labor practice occurred the 9th of June. Isn't that right?

Mr. Statham: Excuse me just one second.

Trial Examiner: All right.

Mr. Statham: The complaint paragraph says—the paragraph says on or about June 9th.

Trial Examiner: On or about, yes. And you are not seeking to change that?

Mr. Statham: No, sir.

Trial Examiner: Does that answer your question, Mr. Clark?

Mr. Clark: Yes, that answers my question.

Mr. Raphael: And thence the question addressed, or the question was asked, and since I am not proposing and don't have the power to amend the Complaint, I feel that the answer already given is enough. Whether I have any theories outside the complaint, I shall state later on in the record.

[52] Trial Examiner: Of course, I am going to adhere to my ruling. I understand there is no objection if you want to ask the witness if a strike vote was taken and what the result of the strike vote was. I am going to sustain the objection as to details, as to what led up to the vote.

Mr. Raphael: Let the record show my exceptions.

Trial Examiner: Yes, and you may, as a matter of fact, make an offer of proof on it.

Louie Campbell—for General Counsel—Direct

Mr. Statham: I would like to make this statement because this is a difficult case, I think, on the law. It is one of the positions of the General Counsel in this case that this was not a strike to modify or terminate a contract. The Union had given up all efforts to modify the contract on May 31st. Mr. Campbell testified he had offered to extend the existing contract for another year. The Company then made its own proposals to modify the contract.

Trial Examiner: You have got all that in.

Mr. Statham: Which the Union found highly unacceptable. Then what caused the strike, I think, is material in that it shows that they were not attempting to modify the contract. They did not engage in a strike to modify the contract. They engaged in a strike because the Company was attempting to modify the contract.

Trial Examiner: Well, you may go ahead with your questioning of the witness with the understanding that we [53] don't want details as to what led up to the vote during this Union meeting at 8:00 a.m. on June 1.

Mr. Statham: Yes, sir. I would like to make an offer of proof in regard to that.

Trial Examiner: You can make an offer by statement or question and answer.

Mr. Statham: If the witness were allowed to answer the question previously propounded to him, and to which an objection was sustained by the Trial Examiner, he would testify during the strike vote meeting on June 1, 1961, it was fully explained to the Union employees, the Union Membership, by the Union Negotiating Committee and Mr. Campbell, that the Union had withdrawn all of its proposals and wage demands, and had requested the Company to extend the existing contract between the parties

Louie Campbell—for General Counsel—Direct

for another year's term, either with or without the minor modifications previously agreed upon, as testified by Mr. Campbell; that the Company then presented written proposals to the Union, as Mr. Campbell testified occurred on May 31st, and it was explained to the Union membership during this meeting that the Company had stated that this was their last offer, that the Union could either take it or leave it, but take it back to the membership. It was explained to the membership by Mr. Campbell, Mr. Bost, and other members of the Negotiating Committee, that Mr. Campbell had repeatedly asked the Company to accept the [54] existing contract for another year, inasmuch as they had lived under it for several years previously, but that the Company had adamantly refused and stated that what they had presented to the Union in writing was their last offer, which the Union could either take or leave. It was explained to the Union membership by the Negotiating Committee what the Company's proposals were that—that one of the proposals was that no employee would have a vested interest in any level of incentive earnings, and that, in their opinion, the Company would then have a right to change those earnings at their discretion and the employees would never know what their wages would be, but undoubtedly it would involve a wage cut. They stated they didn't see how the Union could live with that type of contract. There was quite a bit of discussion among the employees. Several employees expressed their opinions if this was true, and one of the employees read the proposals aloud and stated that was correct, that the Company could change the wages as agreed.

That concludes my offer of proof.

Trial Examiner: The offer of proof is rejected.

Louie Campbell—for General Counsel—Direct

By Mr. Statham:

Q. Mr. Campbell, was a strike vote taken during this June 1, 1961, meeting? A. Yes, sir.

Q. And what type of vote was that? A. Secret ballot vote.

[55] Q. And what was the vote on? A. A vote to whether they accepted the Company's proposal or reject it and strike.

Q. And what was the tally of ballots in that vote? A. I don't know exactly, but somewhere around 125 to 20.

Q. And then did the employees go on strike? A. Yes.

Q. And then as alleged in the Complaint, and admitted in the Answer, the strike commenced on June 1, 1961, is that right? A. Yes, sir.

Q. Now, did the Union and the Company have another meeting after May 31, 1961? A. Yes, sir.

Q. And on what date was this meeting held? A. That was on June 7, 1961.

Q. And where was this meeting held? A. Ward Hotel.

Q. And do you recall what time the meeting was held? A. Approximately 1:00 o'clock.

Q. And who attended that meeting? A. Well, the same committee that attended the others, I believe, with the exception of maybe one. I don't know for sure whether Mr. Bearce attended the one on the 7th, or Mr. Gillam, but it was about the same committee as I remember.

[56] Q. What about the company, were the same people there representing the company? A. I think about the same. Maybe they had one addition, as I remember—maybe one extra.

Q. Was there any other person there other than representatives of the Union and the Company? A. Yes, sir.

Q. And who was that person? A. That was the mediator, Mr. Wheeler out of Little Rock.

Louie Campbell—for General Counsel—Direct

Q. Are you referring to a Mr. Wheeler of the Federal Mediation and Conciliation Service? A. Yes, sir.

Q. Now, would you relate what occurred at this meeting, please? A. Well, it didn't last too long, but Mr. Wheeler tried to talk between us and talk to us and get us together, and at this meeting we offered to take the old contract for another year just as we did in the May 31st meeting, but the Company still wouldn't give over.

Q. Was there any discussion as to what this company proposal of no vested interest, no employee will have a vested interest in any level of incentive earnings? A. Yes, sir, there was. The major—that was the major issue right there.

Q. Would you relate what that discussion entailed? [57] A. Well, we had discussions. Mr. Wheeler talked to us and he talked to the Company, and the Company said that they had this in the contract already but had never used it, but that they didn't intend to use it. So I asked them if they already had it in there, in the contract, in the stipulation, and hadn't used it, and didn't intend to use it, why did they insist on putting it in there and why didn't they just forget it if they had it in there, and then there would be no strike, and there wouldn't have been no strike. Mr. Wheeler made the statement, he says, "I can't figure it out. . . ."

Mr. Clark: I object to what Mr. Wheeler said.

By Mr. Statham:

Q. Was this statement made in the presence of Company people? A. I wouldn't say yes or no, but Mr. Wheeler—

Trial Examiner: Wait, I have got a ruling to make. Unless it was said in the presence of the Company people, I am going to sustain the objection.

Louie Campbell—for General Counsel—Direct

By Mr. Statham:

Q. Was anyone present from the Company when Mr. Wheeler made the statement to which you started to testify to—either yes or no? A. I am under oath, you know, and I don't want to take a—and I don't want to say it wrong. I don't know whether any of them was there or not.

Q. All right, I'll withdraw the question. Was there any more discussion between the parties during which the Company [58] was present, about his clause? A. Well, just before we adjourned we talked about another meeting for the 8th, and Mr. Wheeler at first said he couldn't meet, and then he said he could meet probably about 1:00 o'clock in the evening. So we agreed upon a meeting for 1:00 o'clock on the evening of the 8th. So at that time Mr. Wheeler—I mean at that time Mr. Bethell made the statement, he says, "If the wording is not right in this clause, invested rights incentive earnings," he says, "if it don't suit you maybe we could change the wording in it." I said, "Well, if you want to come up with a change in it tomorrow, at tomorrow's meeting," I said, "if you want to water it down some and bring it to us, if it is watered down like we think it ought to be maybe we can get together on it and we might buy it."

Q. And I understand your testimony, you testified that at the conclusion of the meeting on May 31, 1961, the Company said that that proposal, along with the others, was their last and final offer and you could take it or leave it, right? A. Yes, they wouldn't go along with—they stuck with their proposal of invested rights.

Q. Did they ever retreat from that position during this June 7th meeting other than to state they might probably change the wording? A. That's all.

[59] Q. Now, did the Union and the Company and the Federal Mediator meet as planned, on June 8, 1961? A. No, sir.

Louie Campbell—for General Counsel—Direct

Q. And why not? A. Mr. Wheeler called me about 10:00 o'clock and said that they—he said that there wouldn't be no meeting, that Mr. Bethell had called him and said that they wasn't going to meet, that they were going to send out a telegram that evening that they were terminating all the employees, and I don't know whether I am allowed to say what Mr. Wheeler told me or not, but anyway—

Mr. Clark: I object to anything Mr. Wheeler said there, if Your Honor please, as hearsay, and move it be stricken.

Trial Examiner: Move to strike what Mr. Wheeler communicated to the witness in this telephone conversation?

Mr. Statham: Well, now I would—

Mr. Clark: Yes, sir.

Mr. Statham: Well, now I would—

Mr. Statham: I want to say that I object to them sitting there listening to the questions—listening to the testimony and then making a motion to strike.

Trial Examiner: Are you objecting to the motion to strike the answer or—

Mr. Statham: Well, it seems to me that they are sitting there listening to the whole answer and then they make a motion to strike. Now, I don't say it is intentional, but—

[60] Trial Examiner: In all fairness, I don't see how they can move to strike unless—

Mr. Raphael: Power of clairvoyance, I guess.

Trial Examiner: Are you objecting to the motion to strike. I think it is material what the witness was told by the Conciliator in the absence of any theory on the part of the Respondent that it was the Union which failed to appear at the meeting. Is there any contention on the part of the Respondent that the

Louie Campbell—for General Counsel—Direct

Union failed to appear at 1:00 p.m. on the 8th of June?

Mr. Clark: No.

Trial Examiner: Well, in the absence of that contention, I will grant the motion to strike. I think if you were contending that, I would let the answer so stand. I believe that leaves an unanswered question. Would the Reporter please read the last question?

Mr. Statham: I think, to save time, I will strike the last question and take it another way.

Trial Examiner: All right.

By Mr. Statham (Continuing):

Q. Prior to this meeting—prior to this scheduled meeting on June 8th, 1961, between the Union and the Company and the Federal Mediator, as you have testified to, did you receive a telegram from Mr. John Ayers of the Fort Smith Chair Company? A. You mean prior to the 1:00 o'clock meeting?

[61] Q. Yes. A. In terminating the employees, is that the question you asked me?

Q. Yes, sir. A. I received that letter approximately about five minutes to 2:00 o'clock in Crain's Cafeteria.

Mr. Statham: By way of stipulation, Counsel for the General Counsel offers into evidence as General Counsel's Exhibit 7 a telegram signed by Mr. John Ayers on behalf of Fort Smith Chair Company, to Mr. Louie Campbell, dated June 8, 1961. Would the Respondent stipulate to the authenticity of this telegram?

Mr. Clark: This is a Western Union telegram, is it not?

Louie Campbell—for General Counsel—Direct

Mr. Statham: This is a Western Union telegram, yes, sir.

Mr. Clark: We so stipulate and offer no objection to its introduction.

Mr. Youngdahl: Yes, sir.

Mr. Statham: I now offer this telegram into evidence.

Trial Examiner: In the absence of objections, General Counsel's Exhibit No. 7 is received in evidence. Are we going to put the original in?

Mr. Statham: I don't have the original, sir. Inasmuch [62] as there is no objection, I take it, of course, the best evidence rule is waived.

Trial Examiner: Very well.

(Thereupon, the document heretofore marked for identification as General Counsel's Exhibit No. 7 was received in evidence.)

By Mr. Statham (Continuing):

Q. You have testified you have received this teletype—you testified you received this telegram approximately five minutes to 2:00 on June 8, 1961, is that correct? A. Yes.

Q. Prior to that time, and prior to the scheduled time of the meeting, were you advised that the meeting would not be held as scheduled? A. Yes, sir.

Q. And that is why you and the other members of the Negotiating Committee did not attend the meeting? A. Yes, sir.

Q. Did you, at any time, refuse to meet on June 8, 1961, as planned? A. No.

Q. Now, did you then communicate with Fort Smith Chair Company about another meeting? A. Ask that question again.

Q. Did you then get in touch with Fort Smith Chair Company [63] in regard to another meeting? A. Yes, sir.

Louie Campbell—for General Counsel—Direct

I answered their telegram—John Ayers' telegram—by telegram, or I forget how, but anyway I answered it in writing. I told him—

Q. Well, that's all right.

Mr. Statham: By way of stipulation, the General Counsel offers the following evidence. On June 8, 1961, Mr. Louis Campbell—correction, please—on June 9, 1961, Mr. Louie Campbell sent a telegram to Mr. John Ayers of Fort Smith Chair Company, which reads as follows:

“Dear Sir: We received a telegram from you stating we was carrying on an unlawful strike and work stoppage and the Chair Company employees are terminated. We are not in agreement with your statement. We are still willing to meet with your Company at any time to try to negotiate a new contract. May I hear from you at your earliest convenience?” That's signed United Furniture Workers of America, AFL-CIO.

Would the Respondent so stipulate that that telegram was sent and received by Fort Smith Chair Company?

Mr. Clark: We will so stipulate that it was received by Fort Smith Chair Company.

Trial Examiner: On that date?

Mr. Clark: On that date.

Mr. Youngdahl: The charging party so stipulates.

Trial Examiner: Thank you, gentlemen. The stipulation [64] is received.

Mr. Statham: By way of stipulation, I would like to introduce as General Counsel's Exhibit No. 8 a letter dated June 8, 1961, to a Mr. Clyde Bearce from John G. Ayers, Secretary-Treasurer, Fort

Louie Campbell—for General Counsel—Direct

Smith Chair Company. Is there any objection to my offering this into evidence?

Trial Examiner: Is there any objection?

Mr. Clark: No objection.

Mr. Youngdahl: No objection.

Trial Examiner: In the absence of objections, General Counsel's Exhibit No. 8 is received.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 8 for identification was received in evidence.)

Mr. Statham: As a further stipulation, I would like to propose a stipulation that the following people—the following employees of the—the following persons named in Paragraph 11 of the amended complaint—wait a minute. Strike that stipulation. There is a faster way of doing it.

I would like now to offer into evidence General Counsel's Exhibit No. 9, which is a letter dated June 8, 1961, to Mrs. Audra Dustman from John G. Ayers, Secretary-Treasurer, Fort Smith Chair Company. Does the Respondent stipulate to the authenticity of this letter?

Mr. Clark: So stipulate.

[65] Mr. Youngdahl: No objection.

Trial Examiner: In the absence of objections, General Counsel's Exhibit 9 is received in evidence.

(Thereupon, the document heretofore marked as General Counsel's Exhibit No. 9 for identification was received in evidence.)

Trial Examiner: May I see the two documents? May I see 8 and 9?

Mr. Statham: Yes, sir.

(Trial Examiner examines documents.)

Trial Examiner: Very well, proceed.

Louie Campbell—for General Counsel—Direct

Mr. Statham: By further stipulation, I would like to propose the following people received an identical letter as General Counsel's Exhibit No. 9: Olen Ballard, Alex Banning, Audra Dustman, Martha Hatley, Jimmie Hix, Aline Petree, Essie Rhodes, Mary Scholze, Charles Spangler, A. L. Spence, Buster Whisenhunt, Mae Ballard, Emogene McConnell, Aline Stockton. And that these letters were mailed to them, this letter mailed on June 8, 1961. And, further, that all other persons named in the amended paragraph 11 of the Complaint received an identical letter as that of General Counsel's Exhibit No. 8, which was mailed to those persons on June 8, 1961. Would the Respondent so stipulate?

Mr. Clark: So stipulate.

Mr. Youngdahl: The charging party so stipulates.

[66] Mr. Raphael: Yes.

Trial Examiner: Thank you, gentlemen. The stipulation is received. You mentioned in that first list Audra Dustman. What was the date opposite her name in the amended paragraph 11?

Mr. Statham: June 27, 1961.

Trial Examiner: I had it down as June 7th and I could not figure out how that could be.

By Mr. Statham:

Q. Now, after you sent this telegram to the Company, Mr. Campbell, you requested to meet with them further to negotiate a new contract. Did the Company ever agree to meet with you again? A. No, sir.

Q. On June 8, 1961, Mr. Campbell, was Olen Ballard, Alex Banning, Audra Dustman, Martha Hatley, Jimmie Hix, Aline Petree, Essie Rhodes, Mary Scholze, Charles Spangler, A. L. Spence, Buster Whisenhunt, Mae Ballard,

Louie Campbell—for General Counsel—Direct

Jess Caldwell, F. M. Gentry, Robert Hyde, Emogene McConnell, Thel Richmond, Wendell Smith, Aline Stockton and David Tidewell — were these employees members of your Union? A. Yes, sir.

Trial Examiner: Do you realize, counsel, a lot of this is set out in the Complaint?

Mr. Statham: Yes, sir, I know that.

Trial Examiner: All right.

[67] *By Mr. Statham:*

Q. And did you have a check-off with Fort Smith Chair Company, a check-off agreement? A. Yes, sir.

Q. And were those persons named on that check-off list and were their dues deducted from these employees? A. Yes, sir.

Mr. Statham: No further questions at this time.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record. At this time, we will recess until 1:30.

(Thereupon, at 12:20 o'clock p.m. the hearing was recessed until 1:30 o'clock p.m. of the same day.)

[68] AFTERNOON SESSION

1:30 P.M.

Trial Examiner: The hearing will come to order.

Mr. Statham: At this time, I would like to substitute more legible copies for General Counsel's Exhibits 3, 4, and 5, as was previously agreed to.

Louie Campbell—for General Counsel—Cross

Trial Examiner: Have they been shown to the other side?

Mr. Statham: Yes, sir.

Trial Examiner: All right. Those are the letters of October 15, 1960, February 23, 1961, and March 17, 1961?

Mr. Statham: Yes, sir.

Trial Examiner: The record will show that the substitution has been made.

At the luncheon recess, Mr. Statham had completed his direct examination of the witness. Is there any further direct, Mr. Youngdahl or Mr. Raphael?

Mr. Youngdahl: No, sir.

Mr. Raphael: No.

Trial Examiner: Cross examination.

Cross-examination By Mr. Clark:

Q. Mr. Campbell, did you send notice to the Company, that is, the Fort Smith Chair Company, concerning the desires of Local 270 to terminate the contract that was in existence, that is, the contract that was to expire on June 1, 1961?

Mr. Statham: I am going to object to that question. It [69] was stipulated to. It seems to be repetitious and immaterial.

Trial Examiner: Isn't this covered in the stipulation, Mr. Clark?

Mr. Clark: Well, it was stipulated to. All right.

Trial Examiner: Very well.

Mr. Clark: Excuse me just a minute and let me read that stipulation.

Trial Examiner: I will call your attention to paragraph 4.

Mr. Clark: Right.

Louie Campbell—for General Counsel—Cross

Trial Examiner: I will sustain the objection.

Mr. Clark: I withdraw the question.

Trial Examiner: All right.

By Mr. Clark:

Q. Mr. Campbell, I believe you said that at the meeting on May 29th certain oral propositions were made on behalf of the Union? A. Yes, sir, I said that.

Q. Were those proposals made by your committee? A. The proposals were made by me.

Q. Did you have a Negotiating Committee, as such? A. Yes, sir.

Q. Well, were these proposals on behalf of your Negotiating Committee or on your own behalf? A. It was on behalf of me and the Negotiating Committee, but I read them off to the Company as they had taken them [70] down.

Q. These propositions, or these demands that you made upon the Company, were they approved by the bargaining unit, that is, the people in Local 270, before you made them? A. Well—

Mr. Statham: Just a minute. I object to that. Whether it was approved by the bargaining unit is wholly immaterial.

Trial Examiner: It is immaterial, but I still think it is proper cross examination. I will overrule the objection.

Answer the question, please.

The Witness: Yes, sir.

By Mr. Clark:

Q. At which meeting? A. That, I couldn't tell you. I don't know the exact date of the meeting, but we have the

Louie Campbell—for General Counsel—Cross

Negotiating Committee go over it and then read it off at the meeting.

Q. Were these men that you listed this morning, Bost and LaRue, and so forth, were they members of your Negotiating Committee? A. Yes, sir.

Q. I believe in the afternoon session on May 29th you testified that you agreed on certain propositions, that is, the Company's proposal on unreported absence was agreed upon by you, and that the Company agreed to insert the mother-in-law and father-in-law funeral leave in the contract? A. Yes, sir.

[71] Q. Then I believe you adjourned until May 31st and it was at that time that you first gave your money proposal, is that right? A. That's right.

Q. Your money proposal was two cents across the board with an additional holiday, being Christmas Eve? A. Yes, sir.

Q. Did you make a statement that—did you make a statement at that time to the effect that you had originally planned asking for ten cents across the board? A. I believe I did, yes, sir.

Q. What was your reason for not asking for ten cents at that time? A. The reason was that after talking to the Company and taking everything under consideration, considering the hard times for the past year or so of the Company, we decided we wouldn't ask that much.

Q. And I believe at that time, or let me ask you this question. Did Mr. John Ayers, at that time, review for your benefit and for the benefit of the Committee the Company's economic situation? A. I don't recall.

Q. Well— A. I don't recall just what time Mr. John Ayers brought that in.

[72] Q. Well, was it made at the May 31st meeting? A. I believe it was. I am not sure.

Louie Campbell—for General Counsel—Cross

Q. When was it that—I wasn't too clear on your direct testimony. When was it that you asked the Company to give you some written proposals? A. That was on the evening of the 31st, somewhere in the neighborhood of before, or a little after, around 3:30—3:00 to 3:30.

Q. And did the Company give you some written proposals? A. Yes, sir.

Q. Were these proposals carried back to the bargaining unit, to Local 270? A. Yes, sir.

Q. Were they voted upon? A. Yes, sir.

Q. Was a motion made pertaining to whether to accept these proposals or reject them? A. Yes, sir.

Q. And a motion was voted upon, I assume? A. Yes, sir.

Q. And what was the result of the voting on that particular motion? A. Somewhere around 125 to 20 to reject the Company's proposal.

Q. And, as a result of that vote, the employees went out on [73] strike? A. Yes, sir.

Q. Mr. Campbell, I believe you previously stated that the Company agreed to insert that mother-in-law and father-in-law funeral leave? A. Yes, sir.

Q. And I believe you also stated on direct examination that you agreed to this proposed change in the stipulation that the Company had proposed?

Mr. Raphael: I want to object to that. I don't think that accurately purports the testimony of the witness on direct.

Trial Examiner: Will the Reporter please read the question back?

(Pending question was read.)

Trial Examiner: The inclusion of the mother-in-law and father-in-law clause was the Union's?

Louie Campbell—for General Counsel—Cross

Mr. Clark: Yes, sir. The Company agreed to that. He testified to that.

Trial Examiner: Yes, sir.

Mr. Clark: And now I am asking him this question: At the same time, did the Union agree on a proposed change in the stipulation that the—

Trial Examiner: A proposed change?

Mr. Clark: Yes, pertaining to the incentive—

[74] Trial Examiner: No, just a minute. The question was if he hadn't so testified and you say, Mr. Raphael, it does not accurately reflect his testimony?

Mr. Statham: And I also agree with Mr. Raphael that was not said.

Mr. Raphael: There was no such testimony. Mr. Clark, I think, is mistaken.

Mr. Statham: He said there was an agreement, a concession made in regard to reporting notice—I mean if a person was unable to work that he would notify the Company, if possible. That is not in the stipulation.

Trial Examiner: He testified the Union agreed to that?

Mr. Statham: Yes, sir.

Trial Examiner: I will sustain the objection. Reframe your question.

Mr. Clark: Yes, sir.

By Mr. Clark:

Q. Mr. Campbell, let me ask you this. The Union Negotiating Committee, on this May 31st meeting, agreed to a proposed change in the stipulation that pertained to discussing changes in the standards in the incentive system with the employee? A. No, sir, I don't quite get your question. There's two items in this; one you call the stipulation covers the incentive and the other one where the unre-

Louie Campbell—for General Counsel—Cross

ported absence could be covered in the general contract. That's two [75] different horses.

Q. Mr. Campbell, I hand you General Counsel's Exhibit No. 6 and the Stipulation contained therein on page 3. Beginning with C-2, it says: "(Add the following) 'and the employee will be notified of the standard time and/or pieces per hour required for standard'." A. I think that was in the Company's proposal, yes.

Q. And you did agree to that? A. No, sir.

Q. You did not agree to that? A. No, sir.

Q. Well, did you suggest a modification of this proposal and then agree to the modification? A. The only modification that I agreed upon during the negotiations was that if they would water down the incentive clause; that is the only one I remember anything about.

Trial Examiner: Was this after the strike started?

Mr. Clark: No, that was at the May 31st meeting. That was in the Company's proposal.

By Mr. Clark:

Q. Do you happen to have your copies of these proposed changes with you? A. No, I don't have them with me.

Q. Isn't it a fact that Mr. Bethell at that time, on May 31st, made certain additions to that on your copy, in writing? [76] A. That, I don't remember. The National Labor Board has most of our stuff, but there wasn't any argument on this change you are talking about.

Q. There wasn't any argument about it? A. There wasn't none to any extent. They asked, but we didn't agree upon it, and we only agreed upon one—the unreported absence.

Q. You are saying then, Mr. Campbell, that technically you did not agree to it, but there was no argument about it?

Louie Campbell—for General Counsel—Cross

A. I didn't say that. I said no argument to any extent was mentioned, sure, but we didn't hassle over that.

Q. Well, I will ask you if, on this Stipulation, which I have shown you as General Counsel's Exhibit 6, if you remember Mr. Bethell writing in on that Stipulation, on your copy, after the words "notified of the," the following words: "Method to be followed." Do you remember his writing this in? Look right here (indicating). A. (Witness examines document handed to him by counsel.)

Q. Do you remember his writing in the words "Method to be followed"?

Mr. Statham: I would like to make an objection. It seems to me this is highly immaterial. As I recall, they were objecting to it when it went in on background information, and they are going even into the May 29th meeting in quite detail.

[77] Trial Examiner: Overrule the objection. Answer the question.

The Witness: I don't remember anything about it.

By Mr. Clark:

Q. Did the Company ever ask to withdraw its concession on the mother-in-law and father-in-law funeral leave?

A. I don't remember that, if they asked to withdraw it.

Q. Was any mention ever made of withdrawing it? A. I don't remember if there was.

Q. Mr. Campbell, let me ask you this. Why did you propose to renew this same contract without the change in the mother-in-law and father-in-law funeral leave?

Mr. Raphael: May I have that question?

Louie Campbell—for General Counsel—Cross

Mr. Clark: I asked him why did he propose to extend the contract without the inclusion of a concession that the Company had already made.

A. I didn't say that in my statement this morning. I said I offered if they would come in with the old contract, with the change or without it. That's what I said this morning.

Q. With or without? A. Whichever one they choose. They give us one and we give them one. We just would have settled it without any or with the change, whichever they choose. It didn't make us any difference. That was my testimony this morning.

Q. Did you ask the Company to put in writing any proposition [78] concerning the extension of the old contract without any wage increase? A. Yes, sir.

Q. And I believe your statement was that the Company did not put that in writing? A. Put what in writing?

Q. What I just asked you. A. I am up here and I want to know I get the question right. You asked me if the Company put it in writing to take it to the people, and it's final. Is that what you are asking me?

Q. Yes. A. They put in the proposal that—they put the incentive clause and the two other little clauses that have been mentioned. That's all that was put in. They did put it in writing to offer it to the people, if that's what you are asking.

Q. That is all you read off to the people? A. That was what there was to read off.

Q. Isn't it a fact, Mr. Campbell, that no vote was taken as to whether the people would agree to extending this contract for a year without any wage increase? A. We had taken the vote. It was a vote taken to either reject the Company's offer or accept it. Now, the people was told by the Committee and me that we offered to take the old [79] contract. Sure, the people would have taken it.

Louie Campbell—for General Counsel—Cross

Q. But you didn't take— A. We asked them if they wanted to take it or not.

Q. Well, was a strike vote taken there, or was it just a vote on the proposals that were made by the Company, and they accepted them or turned them down? A. It was a vote taken—it was to reject the Company's proposal and if it was rejected, we would be out on strike.

Q. You didn't include that in your original statement. You are now saying that the motion also included a strike vote? A. They was told if they turned it down they would be out on strike. They knew they had to either accept it or go out on strike. That is the way all these Unions handle it. They all know the procedure. We took—we didn't try to fool the people any. We don't do that kind of business.

Q. What was the purpose of the strike then, Mr. Campbell? A. The purpose of the strike was because of the proposal of the Company to put a clause in there that would cut them people's wages without them having any say about it. That was the strike right there. That is what they struck for. They wasn't striking for money. They wasn't caring anything about any more money in the contract. All they was wanting was the old contract back like it was. They were doing all right.

[80] Q. But now you still you made—to refresh your memory, Mr. Campbell, no vote was taken by the people at that meeting on June 1st as to whether they, the bargaining unit, would agree to accept a contract with no wage increase? No vote was taken on that, was there?

Mr. Statham: I am going to object to that question because I think it is repetitious and, furthermore, immaterial.

Trial Examiner: It is, but this is no reason for objecting. Answer the question, please.

The Witness: Well, I think I answered it two or three times already.

Louie Campbell—for General Counsel—Cross

Mr. Raphael: I object on the further grounds that it has been asked and answered, asked by their counsel, Mr. Clark, and answered by this witness.

Trial Examiner: But, Mr. Raphael, this is cross-examination.

Mr. Raphael: I appreciate that.

Trial Examiner: He isn't bound by the answer he gets the first time. Sure, it was asked and answered, but he doesn't have to accept that. Go ahead.

A. Let me answer it this way. There wasn't two votes taken, if that is your question, if that's what you are getting at. There was only one, but they were combined in the one.

Q. What do you mean, combined? A. We didn't take a dozen votes of the people. If they [81] rejected the Company's proposal, they rejected it.

Q. Mr. Campbell— A. That was after the contract was already up. We—well, I have answered your question.

Q. Has Local 270 ever worked for this company beyond the expiration date of a contract? A. I don't recall in my time. Now, I can't say about this Local because I haven't been here the whole time, except about ten years, and I have been Business Agent somewhere between seven and eight. I don't know what come before my time, but we have, I think, once maybe with some company extended the contract.

Q. I asked you with this Company here. A. I answered you no, as far as I knew, I haven't in my time.

Q. So, as a matter of fact, you have a "no contract-no work" policy, do you not? A. Not exactly, no, sir. We don't have that. We usually—sometime we tell the Company that, but that isn't our policy. We didn't work on that kind of a policy.

Q. Isn't that your practice? A. Not in all instances, no.

Louie Campbell—for General Counsel—Cross

Q. Was it in this instance? A. No, sir.

Q. Mr. Campbell, do you—did you ever, Mr. Campbell, make [82] any offer to the Company, on behalf of the Union, for the employees to continue to work after the expiration of this contract? A. No, sir.

Q. Did you ever go out to the plant and determine whether or not the gates were locked and if anybody could get in? A. Whenever the Company tells us "that's it," and they say that's their final offer and we can take it or leave it, then you tell them half a dozen times you are willing to work something out, what do you want done, to go down there and bust in?

Q. Just answer my question.

Mr. Raphael: I think that's an entirely responsive answer.

Trial Examiner: There is no motion to strike, so I don't have to rule. You are not moving to strike, are you, Mr. Clark?

Mr. Clark: No.

Trial Examiner: Answer the question again.

A. No, that is not our practice.

Trial Examiner: The question was, I believe, did you ever go to the plant after the strike to see whether the gates were locked.

A. Yes, I have been down. The gates wasn't locked as far as I know. No, the gates wasn't locked, no, sir.

[83] Q. Did you ever make the suggestion or proposal to Mr. Ayers, or anyone else connected with the Company, to the effect that "let's go ahead and continue to work even though the contract has expired, until we can iron out these differences?" Did you ever make that suggestion? A. No, sir.

Louie Campbell—for General Counsel—Cross

Q. Mr. Campbell, at the meeting on May 31st, I will ask you if, after the Company put in writing its proposals, that you told Mr. Bethell or Mr. Ayers that you would take those proposals back to the bargaining unit, that is, to the people, but you would not recommend them? A. That's right.

Q. I will ask you, also, if you, at the same time, said that if these proposals were rejected and everything was out, that you would renew your original proposals? A. Would you repeat that question, please?

Q. I will ask you if, at the same time you told the Company representatives that if the Company's proposals were rejected, then everything was out and you would start over from scratch with your original proposals? A. I told—I might have told them that. I am not sure on this. I might have said we might withdraw them if their—we might start over.

Q. I didn't understand. A. I said we might withdraw them if we had to start over, [84] if it was rejected, but I didn't say we would. I said we might. I have been told that by the companies a lot of times, if we didn't take it they withdraw them, so I might have said it. I am not saying I did or didn't.

Q. You could have said it? A. I could have said it, and probably did.

Q. Mr. Campbell, pertaining to these—pertaining to this proposal of the Company about vested rights and standards, did you understand that the Company's proposal in this regard still allowed the employee the benefit of the grievance procedure set up in the contract? A. That would more or less take his rights away under the grievance procedure, as far as incentive is concerned. We have had quite a few arbitrations about these wordings in these contracts. Yes, I knew it would affect them.

Louie Campbell—for General Counsel—Cross

Q. You knew what? A. They couldn't do nothing with it under the grievance procedure if this clause was in there like they wanted it.

Q. Did you understand it was still subject to the grievance procedure? A. It would be subject to it, yes—subject to it, yes.

Q. In other words, you understood that an employee, if he was dissatisfied with the standards or anything else that happened in that regard, could file a grievance under the contract? [85] A. Yes, that is about as far as it would go. Yes, I agree they could still go to arbitration or grievance procedure, but they wouldn't have no power with that clause in there.

Mr. Raphael: Wouldn't have what?

The Witness: Wouldn't have any power with that clause in there. The grievance procedure wouldn't be any good. You couldn't process it with that clause, the way it was written.

By Mr. Clark:

Q. Did you discuss at the May 31st meeting fully with Mr. Ayers here this business about the standards that the Company had in mind? A. Well, other than what you heard in my testimony this morning.

Q. Is your answer yes or no? A. No.

Q. Now, this meeting on June 7th, I believe you said that was in the Ward Hotel, also, was it not? A. Yes, sir.

Q. Now, at that meeting, was there anything said about the mother-in-law, and father-in-law concession made by the Company? A. I don't remember whether it was or not. I would like to say one word here, if I may.

Q. Go right ahead. A. At that time, on that day, my wife was—she had a serious operation, and I hadn't saw her after she was operated [86] on, and I wouldn't—and

Louie Campbell—for General Counsel—Cross

she told me to be sure and go to that meeting, and she said, "I'll be all right," and so I did. So there's a lot of little things like that that I don't remember as well as I should have on that day—little things.

Q. In other words, you are saying on June 7th— A. That I can't recall.

Q. You don't— A. I can't recall whether the mother-in-law clause and a few things was mentioned that day, other than to tell the Mediator, Mr. Wheeler, what we were hung up on, and what the Company offered and what we agreed upon. Other than that, I don't remember any discussions of any kind.

Q. Are you saying that your memory was not as good that day? A. That's right, but I don't remember—but I remember telling him just what the status was, and I imagine he got the same from the Company, but I don't remember any details on that particular thing, discussing it other than just giving Mr. Wheeler the low-down.

Q. Was that all that was done? You told Mr. Wheeler what the Union's position was and told Mr. Wheeler what— A. No, that wasn't all that was said, I'm sure.

Q. You are a little hazy about it? A. Not too hazy, no, sir.

Q. I don't understand, Mr. Campbell. You say you don't [87] remember all the details and— A. I said little details. I don't know everything that was said maybe. I don't remember exactly.

Q. Well, something was said about changing some language at that meeting, wasn't there? A. Yes.

Q. Did you bring that up? A. The Company brought it up.

Q. At the May 29th meeting, did you keep any notes of what happened, any handwritten notes? A. Yes, sir.

Q. Do you have those notes with you? A. They have got them there. They are all in the records there. I don't have them with me.

Louie Campbell—for General Counsel—Cross

Q. How about the May 31st meeting? A. I kept notes on both meetings.

Q. Could I see those notes, please? A. I said I don't have them with me. I have got them down there and got copies. They are in—

Q. Will you get copies from your attorney and show them to me, please? A. I don't know—

Mr. Raphael: We would object to that. The witness hasn't used any notes on his cross examination. There appears to be no foundation for the demand.

[88] Trial Examiner: I suppose, if you insist on it, there would have to be a subpoena issued, because the witness has not used them to testify from. Do you wish to subpoena them, Mr. Clark?

Mr. Clark: Yes, let's get them. I think they would be important because they rely greatly on what was said and on what was said when the proposals were made, and I think that if the witness did make notes they could be used to refresh his memory, certainly.

Trial Examiner: Well, you will have to get a subpoena. Do you want to recess for that purpose?

Mr. Clark: Yes. Also, may I make the request before we recess, if Your Honor please, for the affidavit given to the Board by Mr. Campbell.

Trial Examiner: For that you don't need a subpoena, I don't think. Are you ready to comply with that?

Mr. Statham: Yes, sir.

Trial Examiner: All right. We will have a five-minute recess.

(Short recess was taken.)

Trial Examiner: On the record. Do you have a statement to make?

Louie Campbell—for General Counsel—Cross

Mr. Statham: Yes. In response to Mr. Clark's request for the affidavit of Louie Campbell in the possession of the General Counsel, I am submitting an affidavit of Louie [89] Campbell dated December 1, 1961, signed by Mr. Campbell.

Mr. Raphael: May the record show my objection to the transmission of these documents to the other side, on the grounds that no proper foundation has been laid. The documents were not used by the witness on the witness stand. There is no other foundation laid for the production of the documents and, while I appreciate that the Board has made certain rules, to wit, 112.188, I still think that the rules of the Board are subject to challenge, whereas in a particular case—and I think the circumstances appear here—there is no basis whatsoever, and in this cross examination the laying of foundation not having been made, the documents should not be proffered by the General Counsel. We don't fear any cross examination on the basis of that affidavit, but we think that it is not competent. No foundation has been laid and that rule is unfair, and we contest the fairness and reasonableness of the rule and state that it is outside the scope of everything that the U. S. Supreme Court has said, as, for example, in the Jenks case, and the Circuits Courts around the country having relevance to the same subject, and therefore we object.

Trial Examiner: Well, it is my understanding the rule was put into effect because of the Board's interpretation in the Jenks case. At any rate, there's nothing the Examiner can do but to follow the Board's rules.

Mr. Raphael: I think the Examiner has the power and [90] privilege and, under the circumstances here, the duty of interpreting the rules. I

Louie Campbell—for General Counsel—Cross

know many Examiners—and I think you are one of them—that don't feel that he is living within the straight jacket of the Board, not that you are cantankerous or rebellious, but that you have your own independent judgments, and particularly in the case of this description, where these are new rules and the reasonableness of the rules in the light of legal context of the U. S. Supreme Court decisions and other—and all other relevant matters, should be a subject for examination by the Trial Examiner, even in the absence of a ruling by the Labor Board itself. I may say that this was a contention raised by me in the Thayer case, where it was very important. That was a very important case that lasted six months, and in Massachusetts the Trial Examiner, on the grounds that the witness did not use the documents to refresh his recollection or for other testimonial purposes, and no rational foundation having been laid for the production of the documents, he denied the demand and it was upheld in the First Circuit Court of Appeals by the judge and by the Board.

Trial Examiner: Wasn't that before the Jenks decision, or before they changed the Board's rules?

Mr. Raphael: Yes, yes, it was, Mr. Examiner. I concede all that, but I still think there remains after Jenks, after the rule and after the Board decision in the Thayer case, with [91] the affirmance by the First Circuit Court of Appeals, still is a valid ground for objection. If the opponent—the Respondent in this case—makes demand on the General Counsel for the production of documents, it is like putting a coin in a slot machine. The documents must be moved forward across the table to Respondent, and I submit that such a rule is arbitrary, capricious, doesn't pro-

Louie Campbell—for General Counsel—Cross

mote the interest of justice, and it is not necessary to enable the Board or the Examiners to effectuate the purposes of the Act and it performs no useful function and is, therefore, not a rule which cannot, in all circumstances, be obeyed, or should be obeyed. Therefore, we object.

Trial Examiner: Well, I understand the purpose of the rule is to afford litigants due process under the Supreme Court's interpretation of that in the Jenks case, and, as an Examiner, of course, I have no choice but to follow. Now, you say I can interpret. That is quite true. The Act says—correction—the rules say, 102.118, that after the witness has testified in a hearing the Respondent may move for the production of any statement in possession of General Counsel if the statement has been reduced to writing and signed or otherwise approved or adopted by the witness, and that such motion shall be granted by the Trial Examiner.

Mr. Raphael: You are assuming that the word "shall" binds you, I think.

[92] Trial Examiner: So there is no room for any discretion.

Mr. Raphael: Well, I think *prima facie* it is reasonable to infer there is no room, but on the question whether the rule in this proceeding, at this point, when a demand has been made, and I think of no riper or better time, in that context, whether we can now seasonably, when the request is made for the documents, question the rationality, the standard, the reasonableness, the constitutionality of the rule. I think it is pretty clear that we can.

Trial Examiner: Oh, you can, as far as the Board is concerned.

Louie Campbell—for General Counsel—Cross

Mr. Raphael: I was just going to add this, Mr. Examiner, that I think you can make a ruling which would be within the rule. By that I mean accept the rule and say under these circumstances you don't think that the mandate of the rule should be obeyed, that you have a discretion of what the Board means when they said "shall", and what has been done in some cases means not a mandate in all cases, in all circumstances, as a kind of rule in a slot machine jurisprudence where the documents are handed over, because then what would you be here for? Whenever a demand is made—and I don't mean this contentiously, of course—but there is no transmission through your judgment and discretion, but merely an automatic transmission of the documents.

Trial Examiner: Once I find a rule applicable, I have [93] no choice but to use it. The question here is whether there is a document which has been reduced to writing and which is approved and adopted by the witness. I take it all sides concede that or otherwise the General Counsel wouldn't have turned it over.

Mr. Raphael: Yes.

Trial Examiner: Now, I do suggest this. When I said I am bound by the rule and, therefore, I can't overrule the Board's rule—

Mr. Raphael: It has been done.

Trial Examiner: Well, I suggest this, that the arguments you have made may very well perhaps be addressed to the Board as an argument for the Board to find if its own rule is contrary to law, unwise, or anything else. But, as far as I am concerned, you are addressing your arguments to me, and I can't tell the Board to change its rules. There are two ways that that can be done. You can either wait

Louie Campbell—for General Counsel—Cross

until I issue my Intermediate Report and take exceptions to the ruling, or you can take an interlocutory ruling right now by telegram to the Board and get the Board's rule on that, because this is a Board's rule and regulation which is coming up in a high percentage of cases. It is very frequently used and is a rather important part of the procedure. But if you want to appeal that to the Board, you have a right to make an interlocutory. But there is nothing I can do because [94] I interpret that word "shall" to be mandatory.

Mr. Raphael: Very good, sir.

Mr. Statham: At this time, Counsel for the General Counsel tenders to Mr. Clark the affidavit signed by Mr. Campbell, dated June 28, 1961.

Trial Examiner: All right, the General Counsel is making a tender of the document.

Mr. Clark: Thank you, sir.

Trial Examiner: We will take a five-minute recess.

(Short recess was taken.)

Trial Examiner: On the record.

Mr. Youngdahl: If the Trial Examiner please, I would like to acknowledge, as attorney for Louie Campbell, the receipt of a subpoena from Mr. Clark and the response to the subpoena. I would like the record to show that I am supplying from my files a typed copy of notes on meetings held for negotiating purposes on the dates indicated in the subpoena. I would say further that this was given to me by Mr. Campbell prior to the filing of the charge and, of course, my preparation of the charge. I now hand them to Mr. Campbell and then they are available to Mr. Clark as he chooses.

Mr. Clark: Let me ask Mr. Youngdahl if he ever saw the original of such notes?

Louie Campbell—for General Counsel—Cross

Mr. Youngdahl: No, sir, I have not.

Mr. Clark: And do you know where the original might be?

[95] Mr. Youngdahl: No, sir, I do not.

Mr. Clark: All right, may I see that, please?

Trial Examiner: Let the record show that the witness handed the document to Mr. Clark.

By Mr. Clark (continuing):

Q. Mr. Campbell, you have handed me an instrument here entitled "Notes on Meetings Held for Negotiating Fort Smith Chair contract." It is a typewritten document, sir, containing certain notes or notations. Are you familiar with it? A. Yes, sir.

Q. Did you make these notes? A. I made the notes that is typewritten there, yes. I did not do the typing.

Q. Did you make them in longhand? A. Yes, sir.

Q. When did you make them? A. Well, I made them on the 29th and 31st. That is when they were made.

Q. Do you know who typed them? A. Yes, sir.

Q. Who typed them? A. My office girl typed them.

Q. Do you know where the original of these are—where the original of the notes are at the present time? A. Not at the present time. It seems to me that one of the [96] Board guys has got them. I am not sure who got the original. I didn't have nothing further there to make any copies. We have a machine now, a copy machine, but we didn't have at that time. So, you know, I am not an attorney, and I just says, "here, take them." They even had our check-off list and they finally sent me a copy of the check-off list, the only one I had, and I gave it to them. I wouldn't be for sure that they have got it, but I think they have.

Q. Let me ask you this. When did you make these notes?

A. On the 29th and 31st, as it says.

Louie Campbell—for General Counsel—Cross

Q. Did you make them during the course of the meetings or after the meetings were over? A. No, I made them during the course of the meetings, not after it was over.

Q. Mr. Campbell— A. I made them between—I wrote in some when we had recessed, like that, but I didn't write them all then at the meeting, but some at the recess, but I wrote them on the 29th and 31st up at the Ward Hotel.

Q. While you were in session with representatives of the Company, or during the recesses? A. Mostly when we was in—right there in session, and then some of them I would have to finish at the recess, but while—but during the session, yes.

Q. You have made a note here that the Company agreed to [97] this father-in-law and mother-in-law clause, and you state also here "we agreed upon one of the Company's proposals". A. Yes, sir.

Q. Which one was that? A. That was the one on the—that you would report, if possible, that you can't return to work; if possible, you would report if you were unable to work.

Q. I asked you earlier about whether the Union agreed to the Company's proposal concerning the stipulation, that is, whether the employee would be notified of the standard time and/or the pieces per hour required for standard. Do you recall my asking you about that? A. Yes, sir.

Q. Do you recall, also, that your statement at that time was that the Union did not agree to that? A. Yes, sir.

Q. Now, do your negotiating notes show whether or not you agreed to that?

Mr. Statham: I object to that.

The Witness: It doesn't—

Trial Examiner: Just a moment.

The Witness: I don't know.

Trial Examiner: Just a minute.

Louie Campbell—for General Counsel—Cross

Mr. Raphael: I think it is unfair unless you apprise the witness. I know it is cross examination, but I think it is [98] unfair to ask questions about notes that he has not seen.

Mr. Statham: Mr. Clark is holding the notes in his hand. It seems to me it should be obvious to him what they say.

Mr. Clark: Well, now—

Trial Examiner: These notes were in the witness' possession for a few moments while he was on the stand, and for how long I don't know, but I know the witness personally handed them to Mr. Clark. But I think, in all fairness, it wouldn't hurt to let the witness see them.

Mr. Raphael: Right.

Mr. Clark: May this be marked for identification?

Trial Examiner: All right, Respondent's Exhibit 1.

(Thereupon, the document above-referred to was marked Respondent's Exhibit No. 1 for identification.)

By Mr. Clark (continuing):

Q. Now, Mr. Campbell, I hand you this and ask you to look at these notes. Don't read them, but look at the notes there and tell me whether or not you agreed to that stipuation concerning the standards, that is, the discussion of the standards with the employee involved is what I am talking about. A. You mean discussed them?

Mr. Statham: I understand it is permissible now for this witness to read the notes over, is it not?

[99] Trial Examiner: Yes.

Louie Campbell—for General Counsel—Cross

By Mr. Clark:

Q. All right, Mr. Campbell. A. I tell you, I don't have my glasses here. I know that is my notes because I can see here—because I have seen this paper before, but I am having a little trouble reading them. Let me borrow Elmer's glasses. I have got two pairs and haven't got them here. I don't want to misrepresent anything here because I am under oath.

(Witness reads document.)

A. I would like for you to explain what question you are asking me here.

Q. Do you find on those notes that you made for the meetings of May 29th and 31st, any notation of the fact that the Union agreed to the Company's proposal regarding the stipulation that dealt with discussion of these standards with the employees? A. Well—

Q. Do you find on those notes where you agreed to it? This is it right here, Mr. Campbell (indicating), on General Counsel's Exhibit No. 6. A. Yes, let me read this again now.

Mr. Statham: I don't think he understands the question. Will you repeat the question.

The Witness: I think I am—

Mr. Statham: May we have the question read back, please?

[100] Trial Examiner: Yes.

(Pending question was read.)

Mr. Raphael: I object to that, if the Examiner please. The document speaks for itself. Why don't you put them in evidence and let everybody who sees the answer to that question see whether they contain a notation on there. If he is testing the witness' eye

Louie Campbell—for General Counsel—Cross

sight, it's a good question. If he is testing something, else, I submit it is objectionable.

Trial Examiner: He may be laying a foundation for introduction of another question. I don't know what his purpose is, but the question is proper. I will overrule the objection.

Mr. Statham: I would like to make this further objection. It seems to me he has testified that the Union did not agree to this stipulation. He is now asking the witness "is there anything in your notes which says the Union either did or did not agree to this stipulation"? It seems to me this is—

Mr. Clark: You don't mind if I try to impeach his testimony, do you?

Mr. Statham: No.

Trial Examiner: That is the purpose of cross examination.

The Witness: I understand the man's question now. I can answer it.

Trial Examiner: That is the purpose of cross examination. [101] He doesn't have to accept the answer.

Mr. Statham: I think I understand that when the purpose of cross examination is impeachment, but I don't think his question is phrased in such a way that it would be impeachment, it seems to me.

Trial Examiner: This is cross examination. If he does not get the answer he wants, he can ask another question. If he can't get directly what he wants, he can do it indirectly. I overruled the objection and direct Mr. Campbell to answer the question.

The Witness: Could I have the question one more time? I want to be sure, and I want to see if you can say it twice, ask me twice.

Louie Campbell—for General Counsel—Cross

By Mr. Clark:

Q. Mr. Campbell, I ask you now, after you have read your notes that you took at the meetings that occurred on May 29th and 31st, do you find any notation in these notes to the effect that the Union agreed to and accepted the Company's proposal which is contained as Exhibit No. 12 in General Counsel's Exhibit No. 6, pertaining to discussion of standards with employees? A. No, I don't have it in there.

Q. You do not find it in your notes that you agreed to this? A. No, sir.

Q. All right, sir. I now ask you, Mr. Campbell, whether or not in these notes you made a notation of everything that the [102] Union agreed to concerning the Company's proposals. A. The only thing that says in those notes that we agreed upon one, but I didn't state what one.

Q. I asked you a while ago about that. A. That is what had me fouled up a while ago, you see.

Q. You asked me which one I was talking about, and then you answered your counsel's question saying it was the one about reporting? A. Yes, that's right.

Q. All right. A. That is what I said. Just a misunderstanding there.

Q. So now answer my question. Anything that the Union agree to, you put in these notes, didn't you? A. Yes, sir.

Q. But, at the same time, you don't find anything in these notes? A. The only thing in there, I said, was that we agreed upon one change for the Company, but didn't say what it was. I believe that was your question.

Q. Mr. Campbell, but you earlier testified that what that one referred to was the reporting by an employee? A. Yes, sir.

Q. So that is the one you meant that you had reference to right there? A. Yes.

Louie Campbell—for General Counsel—Cross

Q. Right? [103] A. That's right.

Q. So still in your notes you do not find any reference to that one we are talking about in reference to the stipulation? A. No, sir.

Q. All right. So then you are saying that you did not agree to it? A. If I did, I don't remember it. The only one I remember is the one that we agreed to.

Q. Haven't you previously testified that you did not agree to it? A. But one, yes, that's right.

Q. And on my questioning you previously on cross examination, you testified that the Union didn't agree to this stipulation discussion with the employee, didn't you? A. That's right, yes.

Q. And now I hand you a document, which is your affidavit, and ask you to identify it and state whether or not you gave that affidavit to the Board. A. Yes, I initialed them, yes. I looked at all the pages. I initialed them, yes.

Q. That is your affidavit? A. Yes, sir.

Q. This is the affidavit that you gave to the National Labor Relations Board? [104] A. One of them, yes, sir.

Q. Mr. Campbell, does this affidavit contain copies of the proposals of the Company that were given to you at these negotiating meetings? A. Well, offhand I couldn't say exactly, because I don't just know offhand how many there were, or just what they were at this time, but I can look at them and probably tell you.

Q. Look at them. Are those the proposals, Mr. Campbell, attached to your affidavit? A. The ones I saw so far, yes. That seems to be as far as I can see, correct.

Q. These are the proposals? A. Yes.

Q. These are the proposals submitted by the Company? A. Yes, sir, I believe that's right. As I remember, that's right.

Q. These are exhibits that are attached to your affidavit given to the Board, and I turn to the stipulation, C-2, and

Louie Campbell—for General Counsel—Cross

it says: "Add the following, and the employee will be notified of * * *" and it is written in longhand there, "Method to be followed, standard time and/or pieces per hour required for standard." And I see the handwriting on there below that "O.K. by the Union." Is that your handwriting?

A. That is my handwriting, yes.

Q. You approved that then, didn't you? [105] A. Well, I don't know for sure whether I did or whether I didn't, but it is my handwriting, and I'll tell you why.

Q. That's all I asked you, Mr. Campbell.

Mr. Statham: I think he can go ahead and explain.

Mr. Clark: I wasn't asking him. You can ask him.

Trial Examiner: You can bring that out on re-direct.

By Mr. Clark:

Q. Now, Mr. Campbell, you made the statement on direct examination that Mr. Ayers gave you these Company proposals after you had asked him to put them in writing, and he handed them to you and said "These are the Company's proposals, take it or leave it." Isn't that what you said?

A. That is what I said, yes. He said "Take it or leave it".

Q. He said "Take it or leave it"? A. Yes.

Q. That is what he said? A. But not when he first—you said he said that when he handed me the papers, but—he said it, yes, but not when he handed me the papers.

Q. When did he say it? A. After I began to try to get him to withdraw this incentive.

Q. I will ask you if Mr. Ayers did not say, instead of "take it or leave it," that that was the Company's proposal, and take it to the people? A. No, he didn't say that.

Q. He never did say that? [106] A. He said, "Take it to the people". He said "This is it, take it to them," and

Louie Campbell—for General Counsel—Cross

then we went over it again two or three times, and he said, "that's it, that's the Company's final offer," and finally he said, "that's it, take it to them, and take it or leave it," because he got agitated because I was trying to beg him to take it. That is what was said.

Q. All right. Mr. Campbell, I am going to ask you if this is an affidavit that you gave to the National Labor Relations Board? A. May I ask you one question before I answer your question on that?

Q. Yes, sir. A. If it's fair—

Q. Yes, sir. A. I asked to explain this a while ago and would like to before I answer that question, because I am under oath here, and—

Q. Go right ahead. A. If I ain't badly mistaken, on some of these notes where I have got "OK", and on this here, that is where we was a—studying these over, and if the thing would have went on and we had time, we would probably have okay'd that in order to get something else. Now, that was already on there before I give it to the Board, and that Board comes in here and I [107] don't read it over and see all those little notes, and things, and I just give it to them, and so when I initialed it, why—but I only remember the two changes that I told you about ever agreeing upon. Now, running down these things with the Committee at recesses, I might have put on there we could okay them, but I didn't hand them to the company that they were okay'd, but they did give—but we did them to the Trial Examiner, but that was on there when I give them to him. I am not saying we agreed upon it.

Q. Does your okay on that mean you didn't have any argument about it? A. We wouldn't have had any argument about it. We could have gone on and agreed on some of the things. We didn't argue them all out. That is just a potential marking what I could go by. When I talked to my committee and we agreed on something, then I put down—then I would put that down there on my notes. That don't

Lowie Campbell—for General Counsel—Cross

mean it was final, but I put those down there so I will know how to move without having a recess every five minutes.

Q. I hand you these proposals dealing with this stipulation, and over there it says "Method to be followed". Do you remember that? A. That is my handwriting.

Q. Is that your handwriting? A. That is my handwriting at the bottom, yes.

[108] Q. "O.K. by Union"? A. Yes, sir.

Q. How about "Method to be followed", that is written on there, and is that your handwriting? A. No, sir.

Q. Do you remember Mr. Bethell writing that in there for you? A. No, sir.

Q. All right.

Mr. Statham: I am going to object to any further reference to this affidavit. It has been identified now as his affidavit and these exhibits attached to it. I think if we are going to have any more questions about this document that this document must be in evidence. We just can't guess about it.

Mr. Clark: I'll put it in. We can mark it Respondent's Exhibit 2.

(Thereupon, the document above-referred to was marked as Respondent's Exhibit No. 2 for identification.)

Mr. Clark: I hereby submit this affidavit as Respondent's Exhibit No. 2.

Trial Examiner: Is there any objection to the receipt in evidence of Respondent's Exhibit No. 2?

Mr. Statham: No, sir.

[109] Mr. Raphael: I object, Your Honor, on the grounds already stated, that the document should never have been produced, and further, I assume that we are here to take testimony. Is this being offered in substitution of testimony?

Louie Campbell—for General Counsel—Cross

Trial Examiner: Well, I was about to ask the Respondent the purpose of it. Would you care to explain it, Mr. Clark?

Mr. Clark: Well, I will be glad to withdraw it, Mr. Trial Examiner. It is not substantive evidence, certainly not. It goes only to impeachment.

Trial Examiner: Limited to the purpose of impeachment—

Mr. Clark: I will withdraw it, based on the objection.

Trial Examiner: All right, Respondent's Exhibit No. 2 is withdrawn.

(Thereupon, the document heretofore marked as Respondent's Exhibit No. 2 for identification was withdrawn.)

Mr. Raphael: I move to strike any evidence which has been referred to in this affidavit.

Trial Examiner: The motion to strike is denied.

By Mr. Clark (continuing):

Q. Mr. Campbell, let's get back and let me ask you this. Do you state in this affidavit—and this is the second affidavit, I assume, which you gave the Board, and it is dated December 1, 1961, and was taken by V. E. Burks. Did you make the following statement in that [110] affidavit, "John Ayers told us 'that is the Company's proposal, take it to the people.' "

Mr. Statham: Don't answer that question until I make my objection, please. This document has been identified. I don't think it is proper to start reading statements from the affidavit, or any document, that is not in evidence. I think he is going to have to introduce it in evidence and then start asking.

Louie Campbell—for General Counsel—Cross

Trial Examiner: He is laying a foundation. The witness admits having made a statement in the affidavit. It may not be necessary to produce it. If the witness denies it, then—

Mr. Statham: I agree with you. I withdraw my objection.

Trial Examiner: Answer the question—did you make such a statement in the affidavit given on or about that date?

The Witness: Well, if it is in that affidavit, and I signed it, I made it.

By Mr. Clark:

Q. There it is. Do you want to read it? A. Yes, sir. I don't doubt your word it being there. It is my statement and if I gave it, I made the statement. I told the employees that the Company proposal contained the no vested rights and incentive clause and that we had asked the company to take it out.

Mr. Statham: I am going to renew my objection, and I don't think the ruling that you were referring to a while ago was correct. I think he can ask him what happened, and then [111] if he testifies something that is contradictory to what is in the affidavit, then the affidavit is admitted. But I don't think he can start picking statements out of context in this affidavit and ask him whether he said it, and then when he said he did say it, not introduce the affidavit in evidence, like he did the last affidavit.

Trial Examiner: Again, you see, this man is an officer of a party and, as such, his statement—prior statements—prior to taking this down, can be shown not only for the purpose of impeachment, but also

Louie Campbell—for General Counsel—Cross

perhaps, if he admitted ever having made them to some party, and then denies having made them.

Mr. Statham: Well, if he is going to introduce the affidavit—

Trial Examiner: If he admits having made the statement, I believe that is a fair question, and your objection is overruled.

Mr. Statham: I agree in part, but here is the point. He is asking him if he made these statements, and not reading in context. He is asking him out of context.

Trial Examiner: Same thing. He is asking him whether he made the statements.

Mr. Statham: Yes, I—all right, but he is reading things out of the affidavit and saying “Did you say this in the affidavit,” because it is taken out of context and—

Trial Examiner: Well, I think he has a right to lay the foundation for impeachment—did you make these statements, [112] and so forth.

Mr. Statham: Yes, he has a right to lay a foundation, but when he asks him “did you make this statement,” or “have you ever made such a statement,” and then introduce the evidence, if it is conflicting. If the affidavit isn’t conflicting, then there would be no use in offering the affidavit in evidence, but what he does indirectly is that he is taking things, just isolated sentences, out of the affidavit and gets what he wants into evidence by way of the affidavit, without getting the whole thing in.

Trial Examiner: Well—

Mr. Clark: All right, I will rephrase my question.

Louie Campbell—for General Counsel—Cross

By Mr. Clark:

Q. Mr. Campbell, did you ever tell the employees of the Company, at the Union meeting, regarding the Company's proposals, that this is the Company's proposal—correct that—that Mr. Ayers said "this is the Company's proposal, take it to them." Did you ever make that statement to the employees at the meeting on June 1st? A. No, sir, I didn't make that statement exactly. I may have made that statement and made more, but I made—

Q. Excuse me. Did you make that statement to the employees at the Union meeting, the June 1st meeting? A. Let me read it.

Q. No, just answer my question. I am trying to follow your counsel. I am trying to follow what your lawyer told me to [113] do now, and so I can't because he won't let me.

Mr. Statham: I don't think the witness understands the question.

Trial Examiner: All right, let me see if I can phrase it to suit everybody. What Mr. Clark wants to know, Mr. Campbell, if I am not mistaken, is that during the meeting with the employees at 8:00 a. m. on June 1, did you state at any time during that meeting to the employees, "this is the Company's offer. Mr. Ayers said 'take it to the people.' " Is that your question?

Mr. Clark: Yes, sir.

Trial Examiner: Do you understand it, Mr. Campbell?

The Witness: Yes. Now, what I—now, I probably made that right there, made it, but that ain't—

Louie Campbell—for General Counsel—Cross

By Mr. Clark:

Q. Just answer the question. A. No, I didn't make that at the regular meeting.

Q. You did not make that statement at the regular meeting? A. No, sir, not that statement alone by itself, no.

Trial Examiner: Was it among the statements?

The Witness: That was among the statements I made.

By Mr. Clark:

Q. All right. Now— A. When I give that, I was in a hurry and I didn't read all that stuff and I didn't write it down.

Q. You signed it. A. But I didn't read it all.

[114] Q. He had you under oath, didn't he? A. Yes, sir.

Q. And you are under oath now, aren't you? A. That's right. I said if that is what is in there, I said it. I am not denying saying it, but I say that ain't all I said at the meeting on June 1st.

Q. Did you make the statement that the Trial Examiner asked you at the meeting? A. Yes, I made it.

Q. Did you make the same statement to the Board Officer, Vivan Burks, who took your affidavit? A. I made that one there, yes, sir—Mr. Burks.

Q. And I will read it to you. Did you make this statement: "I then told the employees that the company had told us this is the company's proposal, take it to them." " A. Yes, I told them that.

Q. What Mr. Ayers said? A. Yes, sir, that is one. He said that once, right.

Q. Now, did you tell Mr. Burks, when he was taking this affidavit, that Mr. Ayers also said "this is the Company's final offer, take it or leave it"? A. I didn't tell him that.

Louie Campbell—for General Counsel—Cross

Q. Did he ask you about that? A. No, sir.

Q. When did Mr. Ayers make that statement? [115]

A. Mr. Ayers made that statement on the 31st day of May.

Q. In the morning or afternoon? A. Afternoon.

Q. Now, did he make it at the time that he gave you the written proposals of the Company? A. I don't think he made any statement when he give it to me, when he handed it to me. He more or less probably made that statement that day because he made several statements of "take it to them, take it or leave it, take it to them, this is it, that is the final offer, take it to them, take it or leave it." I said this morning that I kept trying to beg Mr. Ayers. I hated to beg, but I was a-begging because I felt like I should. I kept begging Mr. Ayers and the more I begged then the more it seemed to agitate him, and several times he said "This is the Company's final offer, take it to them, take it or leave it."

Q. All right. Now, Mr. Campbell, you said earlier that it was not the policy of Local Union No. 270 to work out a contract? A. Not in all circumstances, no.

Q. Now, you made that statement? A. Yes, I made that statement, that it is not the policy.

Q. Well— A. It is not the policy.

Q. Well, have you ever made a statement to anybody that it [116] is the policy of Local 270 not to work out a contract? A. The people says no contract, no work.

Q. Is that what your people think? Is that the policy they follow? A. Not all the time.

Q. Well— A. What they follow and what they talk is different.

Q. What do you mean by that? A. You can hear people talking anything, but they don't follow what they talk.

Q. Is that the policy they followed in these negotiating sessions?

Louie Campbell—for General Counsel—Cross

Mr. Statham: Objection.

The Witness: Will you state the question again?

Trial Examiner: There is an objection to the question. What is the basis of the objection?

Mr. Statham: I think it is an uncalled for statement. "Is that the policy they followed in negotiations?"—I don't see what that elicits any material evidence in this case.

Trial Examiner: It isn't material, but I am going to allow it. I give cross-examination a great deal of leeway. As I said before, he doesn't have to flag what he is trying to get at. He can approach it indirectly. Answer the question.

The Witness: It is not the—I can't say yes or no to that question because sometimes they do and sometimes they [117] don't.

By Mr. Clark:

Q. Are you trying to follow that policy now? A. No, sir.

Q. During the May 31, 1961, negotiating session, did you ever make the statement to anyone that you did not—strike that. Have you ever made a statement to anyone that the members of Local 270 did not want to work without a contract? A. I may have made that statement, yes. I can't say I made it there.

Q. Have you ever made a statement to anyone that Local 270 always felt that working without a contract allows the employers to build up their inventory and get ready for a strike if the contract is not reached? A. Yes, I have said that, yes.

Q. Have you ever made the statement that Local 270 has followed the policy of, and tradition of, not working without a contract? A. I probably have.

Louie Campbell—for General Counsel—Cross

Q. Have you or haven't you? A. If it is in there, I did.

Q. I am not asking you whether it is in here or not. A. Can you remember everything that has happened in your life?

Trial Examiner: Now—

The Witness: I am cross-examining the attorney.

[118] Trial Examiner: Just answer the question.

The Witness: I probably did.

By Mr. Clark:

Q. And have you ever made a statement that all the furniture employers in the Fort Smith area are aware of that policy? That is, no contract—no work? A. Yes, sir, they are aware of it.

Q. And have you made this statement to anybody: "To my knowledge, members of Local 270 have not worked without a contract since I have been a Business Agent." A. I have said that, yes. I have said that.

Q. Well, is it true, as a matter of fact? A. I stated before, since I have been in, I don't know—I stated that I thought maybe one time, but I can't recall. I think I made that statement.

Q. Mr. Campbell, at the meeting on the morning of June 1, 1961, did any of the committeemen make a statement about going out on strike, or the reason for going out on strike?

Trial Examiner: As I remember, Mr. Clark, you vehemently objected to this testimony coming in.

Mr. Clark: Well, if your Honor please—

Louie Campbell—for General Counsel—Cross

Trial Examiner: I limited—do you recall I limited the other side to show only that a vote was taken and the result of that vote?

Mr. Clark: Yes, sir. All right, I will withdraw that.

Trial Examiner: I take it you don't want to enlarge [119] the issues, Mr. Clark.

Mr. Clark: All right.

Mr. Statham: I might add Mr. Clark has, of course, gone into this meeting already himself.

Trial Examiner: I don't want it to go any further. I think it's a waste of time, since I didn't allow you to go into it.

Mr. Clark: That is all.

Trial Examiner: Redirect?

Mr. Statham: No further questions.

Trial Examiner: Mr. Raphael?

Mr. Raphael: No questions.

Mr. Statham: If I may request a return of the affidavits?

Mr. Clark: They are so returned.

Trial Examiner: All right. Now, Mr. Campbell, you may or may not know the answer to this question. If you don't know the answer, just say so. Did the Respondent Company continue to operate throughout the entire course of the strike?

The Witness: Yes, sir.

Trial Examiner: Is that from your own personal knowledge?

The Witness: I don't know the exact date they started the operation.

Trial Examiner: That, you don't know?

The Witness: No, I don't know the exact date, but probably [120] within a week or ten days.

Louie Campbell—for General Counsel—Cross

Trial Examiner: Then your answer would be no, not through the entire period of the strike. You don't know whether they started immediately or—

The Witness: They started within, I would say, ten days after the discharge of the employees.

Trial Examiner: All right. Was there any picket lines put up around the plant?

The Witness: Yes, sir.

Trial Examiner: There were?

The Witness: Yes, sir.

Trial Examiner: These questions, gentlemen, go into matters the witness hasn't testified to before, and if there is any objection, please feel free to voice it. Now, approximately when did the picket lines first start?

The Witness: Oh, somewhere around the early afternoon and early—the early afternoon of June 1st.

Trial Examiner: Even though the plant wasn't operating that day?

The Witness: That's right.

Trial Examiner: You didn't wait for the plant to resume operation to put a picket line up?

The Witness: No, sir.

Trial Examiner: Did you ever receive a reply from the Company to your telegram of June 9th in any shape or form, [121] verbal or written?

Mr. Raphael: Mr. Examiner, may the witness be shown that telegram?

Trial Examiner: Oh, certainly.

Mr. Raphael: So he will know what he is answering.

Trial Examiner: Oh, absolutely. I don't think we have a copy in evidence though. That was read.

Louie Campbell—for General Counsel—Cross

Mr. Bethell: We have a copy of it here somewhere.

(Witness is handed telegram.)

Trial Examiner: I want to see if it is the same as was read in evidence. If it is June 9th from the witness to the Company, then that is the one I am referring to.

Mr. Raphael: Yes.

The Witness: I don't remember for sure. I don't think I received an answer to it.

Trial Examiner: Off the record a moment.

(Discussion off the record.)

Trial Examiner: On the record. Mr. Campbell, to the best of your recollection, what did the picket sign say? At that time, there were picket lines carried?

The Witness: Yes, sir.

Trial Examiner: Do you recall what they said?

The Witness: I couldn't probably give you the exact words, but I think that they said "Fort Smith Shirt Company is on strike." I believe that is what it said. We could [122] probably produce some of them.

Trial Examiner: I don't want to put you to too much trouble, unless some of the parties—well, did they have the Union number, the Local?

The Witness: Local 270, most of them. Some of them may have made some up and would leave it off, but the original, I think, I had Local 270 on it.

Trial Examiner: Well—

The Witness: All of them might have not had it, because a fellow might tear his up and might fix him up one, but pretty well that is what was on them.

Trial Examiner: That is all. In view of my questions, are there any further questions?

Mr. Clark: We have one further question.

Louie Campbell—for General Counsel—Cross

By Mr. Clark:

Q. Did the picketing continue on throughout the period when the Company started operating again? A. Yes, sir.

Mr. Clark: No further questions.

Trial Examiner: I think we should get the date when the picketing ceased. When did the picketing cease?

The Witness: I believe it was on the 14th day of December. It is the—it was either the 14th or the morning of the 15th. It might have been the morning of the 15th.

By Mr. Youngdahl:

Q. Did the picketing continue during the entire period of the strike? [123] A. Yes, sir, up until the morning of the 15th. I believe that is about right.

Q. That was the month of December, 1961? A. Yes, sir.

Trial Examiner: As I understand it, then, it began on June 1, 1961, and continue through December 14, 1961?

The Witness: Yes, sir, that is right.

Trial Examiner: No further questions from me. Do you gentlemen have anything further?

Mr. Clark: One question.

By Mr. Clark:

Q. Mr. Campbell, isn't it a fact that prior to June 7, 1961, the Union, at the request of the Company, came in and unloaded some wood? A. I am pretty sure you are right. They did. We never did keep anybody from unload-

Louie Campbell—for General Counsel—Cross

ing up until they started their charge itself. That is in our contract, yes, sir.

Q. There is a provision in the contract that provides for that? A. Yes, sir.

Q. And also certain maintenance? A. Yes, until the Company starts production work. I am sure that is right.

Q. So prior to June 7th, you did furnish men for unloading wood? A. As far as I know, yes.

[124] Mr. Clark: That is all.

Trial Examiner: I take it there is no contention on the part of the Respondent that there was any violence in connection with the strike?

Mr. Clark: No.

Mr. Bethell: Yes, sir, we are not making an issue of it, Your Honor, but there was, since you asked the question.

Mr. Statham: I object to that.

Mr. Youngdahl: There was a state court action, but there was no violence alleged and, furthermore, it is immaterial.

Mr. Bethell: I beg your pardon. There was a court injunction issued on it.

Trial Examiner: That is not material in this case.

Mr. Youngdahl: No, sir.

Trial Examiner: It is not material here if nobody is raising it as an issue. We have got enough issues without looking for more. Are there any further questions? (No response) Thank you very much. You are excused.

(Witness excused.)

Trial Examiner: We will take a five-minute recess.

(Short recess.)

Trial Examiner: On the record. Next witness.

Elmer Bost—for General Counsel—Direct

ELMER BOST a witness called by and on behalf of the General Counsel, [125] having first been duly sworn, was examined and testified as follows:

Direct examination:

Trial Examiner: State your name and address.

The Witness: Elmer Bost, 1312 Bray Street,
Fort Smith, Arkansas.

By Mr. Statham:

Q. Mr. Bost, will you state your occupation, please?

A. I am a furniture worker, stock saw.

Q. Do you hold any office in Local 270 of the United Furniture Workers of America, AFL-CIO? A. Yes, sir, President of the Local.

Q. And how long have you held this office with this Union? A. I have held the office with the Union around eight or nine years, but I have been out during the time, and since 1956 I have been President of the Local.

Q. Continuously since 1956? A. Yes, continuously.

Q. Did you serve on the Union Negotiating Committee last May—May of 1961? A. Yes, sir.

Q. And during this negotiation with Fort Smith Chair Company? A. Yes, sir.

Q. Were you present during both the May 29th and May 31st meetings? [126] A. Yes, sir.

Q. Would you please relate what occurred during the afternoon session of May 31, 1961? A. Well, sir, we went back into negotiation somewhere between 1:00 and 1:30 and we discussed the proposals that had been put across the table on both sides, and the Union saying that it was getting late, and we wanted to notify the employees where to meet and what time to meet the next morning. So during our lunch hour we had made up our mind just exactly

Elmer Bost—for General Counsel—Direct

what we would settle for and along about this time Mr. Campbell suggested—around 3:30, somewhere along there—that the Company adjourn and come back with the proposal, with the old contract as it was, or with the two articles, or two paragraphs, that were agreed upon between the companies—the two proposals which had been agreed upon—that the Union would take them with or without it, the old contract, either way the Company wanted to do that. At that time, the Company did adjourn for a few minutes, and in a few minutes they came back with these written proposals, which we looked over, and then Mr. Campbell, he says to John, he said, “John, we cannot and will not,” he said, “I cannot and will not recommend this, and you know that it will be a strike.” He says, “We don’t want this whatsoever if we can get out of it, and if you will make a proposal to accept the old contract, why, then, we will go back and recommend it to the people, [127] and you know—and I can assure you that you will have a contract for another year, if you will do this.” And he kept repeating it and John, he acted like he got a little agitated or something, and he says, “There it is, take it or leave it; take it to the people, take it or leave it.” He hit the table with his fist. He wanted to emphasize it.

Q. What occurred then? A. We tried to talk to him a little more and even Mr. Bearce, he said, “John, you have been a-working with this contract for 18 or 20 months,” and he says, “it looks to me like that I don’t see why you can’t go ahead and work with it another year,” and John, he pointed to Mr. Campbell and said, “There is the little man we’re after.” What he meant by it, I don’t know.

Q. Now the next day, did the union membership have a meeting? A. Yes, sir.

Q. And did you attend this meeting? A. Yes, I did.

Q. And were all the members of the Negotiating Committee present? A. Yes, sir.

Elmer Bost—for General Counsel—Direct

Q. At this meeting? A. Yes.

Q. Was it also explained to the membership what had occurred? [128] A. Yes, sir, I would think so.

Q. Was the Union's last proposal—in other words, what you have testified to there, withdrawing your proposals and saying that you would go along with the old contract for another year, with or without the two minor changes, was that pointed out to the Union membership? A. I am sure it was.

Q. There is no doubt in your mind, is that what you mean? A. There is no doubt in my mind. It was pointed out.

Q. Was the Company's last proposal explained to the Union membership? A. Yes, sir.

Q. And how was it explained to the membership? A. I read it over. I read the proposals off and then I asked the Committee to get up and say what they thought about the proposals and explained it to them.

Q. Now—

Mr. Clark: I object to this, if Your Honor please.

Trial Examiner: Sustained.

Mr. Raphael: May I be heard briefly on this?

Trial Examiner: He has gone over this with the previous witness on direct, but I'll hear you.

Mr. Raphael: I think it would be serious, possibly a serious mistake, not to allow him to answer for this reason, Your Honor. I speak in terms of economy. My assumption is [129] that if we were to make an offer of proof at what took place at that meeting, and you rejected and limited the testimony, that neither the Board, nor you, could make a finding on the basis of the offer of proof.

Trial Examiner: Of course, an offer of proof is not evidence; I agree with you on that.

Elmer Bost—for General Counsel—Direct

Mr. Raphael: That is pretty clear. So if it should turn out on re-examination, or re-consideration, that this evidence is material, then what we are faced with is a new hearing, right? Unless the parties want to accept the offer of proof by way of stipulation, which I have seen done, otherwise we have got to have a new hearing. Now, this is a matter of considerable concern to both sides, and also for the perpetuation of policy of the law, one way or the other. In the interest of economy, and I think the testimony is going to be too long, and it wouldn't take us long, direct and cross, to elicit what took place at that meeting. It wouldn't take any longer than presenting into the record an offer of proof.

Trial Examiner: Mr. Raphael, I don't want to get into the record something which I deem immaterial. An offer of proof is much shorter. It can't be objected to. It can't be cross examined and it need not be replied to, and if we get into that which I consider immaterial, where is it going to lead? One law professor used to say, "When the train jumps the track, [130] it can go anywhere." I find it is immaterial. Now, I am going to have to assume the Board is going to uphold me. If the Board reverses me on that, that is a chance I am going to have to take. I'm sorry, but I will not allow either side. I stopped the other side from it also, and I am going to allow either side to go into detail as to what was said at this meeting, at this Union meeting, and I will permit an offer of proof so that the parties can be protected in their rights. Do you want to make an offer of proof?

Mr. Statham: I would like to point out that I agree with you, and Mr. Clark in his last question asked about the meeting, but prior to that I believe,

Elmer Bost—for General Counsel—Direct

if you will recall, Mr. Clark went into quite a bit of detail.

Trial Examiner: He did and nobody objected.

Mr. Statham: Certainly, I think by going into it he certainly opened the door to further evidence.

Trial Examiner: No. I don't want to get into a realm of which I consider immaterial. It unduly lengthens the hearing. As I said before, we have got enough to do to cover the issues.

Mr. Statham: May I point this out? There are several theories in this case, and one of the chief ones is the fact the Union was not trying to modify the contract at the time it went out on strike. Now, I don't think it could be, in any way, prejudicial to the company to allow this evidence to go [131]in. In fact, I have heard no objection based on anything prejudicial, but merely the fact it is immaterial. In other words, it would be surplus knowledge. Now, I think on a case involving 185 people out of work, I think it is more important to look upon the material evidence rather than "let's hurry and end this hearing".

Trial Examiner: I am not concerned with hurrying. I am concerned with keeping everybody's mind focused on what the issues are. We have some far reaching important issues involving quite a number of people in this case. Let's keep our minds on the issues and not wander out in every direction. This is not the way to conduct a hearing, to go out all over in all directions at once.

Mr. Statham: I may point out Mr. Clark asked questions, quite a bit at length, showing that this certainly is an issue, in his opinion, as to what the strike is over. He asked several questions of Mr. Campbell, so certainly it is important in the Respondent's mind.

Elmer Bost—for General Counsel—Direct

Trial Examiner: Did you object?

Mr. Statham: I did not object Mr. Clark apparently thinks it is one of the basic issues here, and I think it is one of the basic issues here. That is why I am trying to go into it. I think the fact it might be immaterial is not important. And will it unduly prolong the hearing? Well, I think if it does unduly prolong the hearing, it is time well [132] spent, because I think it is material evidence that needs to be developed.

Trial Examiner: I will give you ample time to make your offer of proof, but I am not going to take time to delve into a matter that is not material here.

Mr. Statham: Well, don't you agree though that why they are striking is material?

Trial Examiner: I don't—

Mr. Statham: It is the opinion of the General Counsel.

Trial Examiner: I think whether they struck to modify the contract or not depends on the contract they took. The employer was not in these discussions. This was a discussion among the employees in which the employer wasn't present, wasn't notified of, and it can, in no manner, show the purpose for the strike.

Mr. Statham: This is just an analogous situation, but consider an unfair labor practice strike—an analogous example—let's say an 8(a) (3). The question is material in this hearing, is it not, as to why the employees went out on strike?

Trial Examiner: The question is whether the employees struck to terminate or modify the contract.

Mr. Statham: Certainly, sir.

Elmer Bost—for General Counsel—Direct

Trial Examiner: All right, I think that can be shown by their action. It is relevant what they said to the employer [133] at these meetings, but I don't think what they were doing off by themselves in a meeting; what they discussed at that point, has nothing to do with the issues.

Mr. Statham: I think it is material why they went out on strike and what happened at the strike meeting.

Trial Examiner: You think it is important and I will let you make an offer of proof.

Mr. Statham: I don't want to belabor the point, but it seems to me you are ruling that if they, the Union, for example, does not tell the Employer that it is striking over an unfair labor practice, then it can't be an unfair labor practice?

Trial Examiner: You could call 108 different persons and ask why they are out on strike, and you will get 108 different answers. I am going to determine this the way I feel the courts and the Board will look at it. Do you wish to make an offer of proof?

Mr. Statham: Yes, sir. I will withdraw the last question then and ask this question so that I may have it sufficiently broad.

By Mr. Statham:

Q. Mr. Bost, would you relate what occurred at the strike vote meeting on June 1, 1961?

Mr. Clark: I object, if Your Honor please.

Trial Examiner: I will sustain the objection, unless the question is limited to the proposition that was put to a vote [134] and the result of the vote. Now, you can make your offer of proof.

Elmer Bost—for General Counsel—Direct

Mr. Statham: If the witness were allowed to answer the question just propounded to him, and to which an objection was sustained, he would testify that at this meeting each of the members of the Negotiating Committee spoke to the membership and advised them what had occurred throughout the course of the negotiations. It was explained to the membership that the Union had withdrawn all of its proposals at the May 31st afternoon session and requested the Company to agree to renew or extend the existing contract between the parties for another year, either with or without the minor concessions made by each party; that it was further pointed out to the membership committee—or the membership rather—by the membership committee—strike that—by the members of the Negotiating Committee, that the Company had rejected this proposal and had stated that it would not agree to extend the existing contract for another year's term; that it had presented written proposals of the Company which adamantly stated that it was the last and final offer and they should take it to the membership and either take it or leave it; that these written proposals, which were the Company's last and final offer, included a provision which provided that, to the effect, no employee would have the vested interest in any level of incentive earnings. It was further pointed out [135] to these employees that, in the opinion of the Negotiating Committee, that their wages would no longer be definite, that this would be subject to change by the Company, and that they would never know what their wages would be, and that it would certainly involve a wage cut for them. Several of the employees then stated their opinion on it and agreed with the Negotiating Committee, and then it was explained by Mr. Campbell that they would

Elmer Bost—for General Counsel—Direct

have a vote and that if the employees voted to reject the modifications of the contract, which the Company was demanding, that they would then go out on strike and strike might be a long one. A vote was taken, which was 125 to 22—125 in favor of striking and 22 against striking.

Trial Examiner: I will reject the offer of proof, except the last sentence. There is no objection to proving that.

Mr. Statham: All right.

Trial Examiner: Isn't that right, Mr. Clark?

Mr. Clark: Yes, sir. The vote though, as I understand it, was to accept the Company's proposals or to reject them.

Trial Examiner: The witness can testify what the vote was though?

Mr. Clark: Oh, yes.

Trial Examiner: He can testify a vote was taken and the result of that vote?

Mr. Clark: Oh, yes.

[136] Mr. Statham: Now, I think that is our problem here on the vote, and I—

Trial Examiner: I have ruled on two different witnesses now, and I dare say that if you put another one on the stand we will go through the same thing, and we are just going to have to adhere to this. Now, if you want to make an offer of proof, all right. My ruling will be that the offer of proof is all rejected except the last sentence, and the last sentence you may—

Mr. Statham: Well, I am only trying to point out that I think you're rejecting evidence which both the Respondent and the General Counsel and the Union feels is material.

Elmer Bost—for General Counsel—Direct

By Mr. Statham, (Continuing):

Q. Mr. Bost, was a strike vote taken during the meeting on June 1, 1961? A. Yes, sir.

Q. And what was the outcome of that vote? A. 125 to 22.

Q. What was the vote on? A. It was a vote on the Company's proposals.

Q. Well, would you explain that? You mean the Company's proposals—

Mr. Clark: I object to him leading the witness.

Trial Examiner: No, I think the question is asking him to explain his answer. Overruled.

By Mr. Statham:

Q. What Company's proposals are you referring [137] to? A. To the last Company's proposal that they give us just before the meeting ended on May 31st, that was put to us in writing.

Q. Did the Union have another meeting with the Company? A. After the May 31st meeting you mean?

Q. Yes. A. Yes, sir, on June 7th.

Q. And was the Union Negotiating Committee present in a body at that meeting? In other words, were all the members of the Union Negotiating Committee present?

A. There might have been one a-missing. There might have been one.

Q. And did the same Committee represent the Company at the June 7th meeting? A. Yes, sir.

Q. Was there anyone there other than the Company and the Union representatives? A. Yes, sir.

Q. And who was present? A. The Federal Mediator.

Q. And what occurred at that meeting? A. Most of you knows how a mediator works. He will come in and

Elmer Bost—for General Counsel—Cross

meet with the Union or the Employer and then he will talk to each one separate and then he will talk with them together [138] and just what happened, he talked to us and then he talked to them, and then he finally got us all together and when it ended up, why, Mr. Bethell made a statement on this vested rights that we have had such an issue over, that if it wasn't worded right that he would re-word it, and Mr. Campbell stated to him, "Well, if you will weaken it down, water it down, bring it back and let us take a look at it, maybe we can agree upon it." That is practically the way the meeting ended.

Q. Did the Union again offer to extend the existing contract for another year? A. Yes, sir.

Q. What did the Company say to that proposal? A. They said no. They wanted this other. They had to have this other proposal in there, they said.

Q. Were there any further meetings between the Union and the Company over negotiating the contract? A. No, sir.

Mr. Statham: No further questions.

Cross-examination by Mr. Clark:

Q. Mr. Bost, did these proposed changes represent anything different than had been in practice for the last four years under this contract? A. Any proposed changes, anything different?

Q. Yes, sir. [139] A. No, sir.

Q. Now, you stated at the beginning that the Company agreed to the mother-in-law and father-in-law, and did you say also that the Union agreed to a proposal at the May 31st meeting? A. Yes, we did.

Q. What proposal was that? A. That was on the—when a man was absent to report his absence as soon as he could.

Elmer Bost—for General Counsel—Redirect

Q. In other words, the Company made a concession there on the mother-in-law and father-in-law clause? A. Part of a concession.

Q. And the Union accepted it? A. Yes, sir.

Q. Yet you say, Mr. Bost, that the Union came up later on with a proposal to extend the old contract. Why would you want to give up a concession that had been made by the Company? A. We give them their choice. They could either take it with the two proposals or not. We would have taken it either way, to keep the two or we would have taken the old contract without the two changes.

Q. You have been in negotiating sessions before with this Chair Company, have you not? A. Yes, sir.

Q. Have you ever given up a concession made to you by the [140] Company before?

Mr. Raphael: I object to that as being immaterial and remote.

Trial Examiner: Overruled. Answer the question.

A. Not that I recall.

Q. Did you take any notes at these meetings? A. I sure did not.

Q. All right.

Mr. Clark: That's all.

Trial Examiner: Redirect?

Mr. Youngdahl: Yes, sir.

Redirect examination by Mr. Youngdahl:

Q. Elmer, Mr. Clark asked you a question and he said were the proposed changes any different from what you had had the last four years, and you said no. What wasn't different from the last four years, what proposed changes?

Elmer Bost—for General Counsel—Redirect

A. They always got proposed changes that has been presented from each side. I thought that is what he was talking about, not actually the same in words, or same articles, or nothing, but I know—but I thought maybe he was talking about the same, you know—

Q. You mean the Company had proposed these same kind of changes over previous negotiation sessions over the last four years, is that right? A. Yes, sir.

[141] Q. Now, in your opinion, did the changes that the Company was proposing, that is, the change in the contract about vested interest in incentives, did that change make any change in the contract that you had before? A. Yes, sir.

Mr. Clark: I object to his opinion.

Trial Examiner: This man has been representing a Local for a long time. I think he can be asked his opinion on a question of that sort. Of course, the weight to be given to the opinion is another matter. Answer the question.

The Witness: I said yes.

By Mr. Youngdahl:

Q. Was there a discussion in the negotiating meeting on May 31st about how this vested interest proposal that the Company was making, how it would change? A. Yes, sir.

Q. About how would it change the present conditions and wages, and so forth? Was there a discussion on that on that day, at the May 31st meeting? A. Yes. The Union tried to bring up questions on it, in which we didn't get practical answers.

Q. What did the Company say in answer? A. They would say, "Well, we ain't going to use it." We asked

Elmer Bost—for General Counsel—Recross

them what did they want it for then, and they said, "Well, we have got to have it in there."

Mr. Youngdahl: That's all.

[142] *Recross examination by Mr. Clark:*

Mr. Bost, on these changes in vested rights and incentives that we are talking about here, did not the Union—both the Union and the Company—agree at the May 31st meeting, or any other time it was discussed, the 29th or 31st, that these changes merely represented a clarification of what was already in the contract? A. Did we agree to that, sir? Is that what you asked me, if we agreed to that?

Q. Yes. A. No, sir, we did not agree to that.

Q. Didn't the Company contend that these changes only represented clarifications of what was already in the contract? A. Not that I can recall.

Q. Could they have and you don't recall it?

Mr. Raphael: Objection. It's hypothetical and mere possibility.

Trial Examiner: Overrule the objection. Answer the question.

A. It could have been and I couldn't recall it, yes.

Mr. Clark: That is all.

Mr. Statham: No further questions.

Trial Examiner: Is there anything further, Mr. Raphael?

Mr. Raphael: No, sir.

Trial Examiner: Thank you very much. You are excused.

D. C. Cherry—for General Counsel—Direct

[143] (Witness excused.)

Mr. Raphael: May we have a recess now?

Trial Examiner: We will take a five-minute recess.

(Short recess.)

Trial Examiner: Let the hearing come to order. Call your next witness.

D. C. CHERRY, a witness called by and on behalf of the General Counsel, having first been duly sworn, was examined and testified as follows:

Direct examination:

Trial Examiner: State your name and address.

The Witness: D. C. Cherry, Route 2, Box 157, Muldrow, Oklahoma.

By Mr. Statham:

Q. Mr. Cherry, where are you employed? A. Borg-Warner.

Q. How long have you—strike that. Have you ever been employed by the Forth Smith Chair Company? A. Yes, I have.

Q. And during what period of time did you work for this company? A. July, 1946, to June, 1961.

Q. Did you serve on the Union Negotiating Committee during the contract negotiations with the Forth Smith Chair Company? A. Yes, sir.

[144] Q. Would you please relate what occurred during the afternoon session of the May 31, 1961, meeting, please? A. We came back after lunch, went over our proposals

D. C. Cherry—for General Counsel—Direct

that the Company had given and the Union had give, told them that we—we asked them what they had thought of the proposals that we give in money before noon, and they said there could not be any money. So we just discussed their finances quite lengthy. Time was getting late. Mr. Campbell and us discussed at noon what our final offer would be. Finally, Mr. Campbell asked them—or told them that if we would withdraw all of our proposals would they withdraw all of theirs, and sign the old contract for another year, with the proposals that we had agreed to, or without them, either way the company wanted it. The Company then had a recess. They came back with a list of proposals in writing that they had and started talking again about these proposals. Mr. Campbell said, "We cannot go along with that. Why don't you give us the old contract again?" Mr. Ayers kept on talking that they had to have something. Mr. Ayers finally said, "Now, this is it. This is the final proposal." He said "Take it to them." He said "Take it or leave it." Mr. Bearce asked him why he couldn't go along with the old contract that we had, that we had went along with it for six months there, extended it previously.

Q. Now, Mr. Bost—excuse me. Mr. Cherry, who is Mr. Bearce? A. He was on the Negotiating Committee.

[145] Q. The Union Negotiating Committee? A. That is right.

Q. Go ahead. A. Mr. Ayers said that he had to have something to go by, that the Company was financially embarrassed, you might say. He said they had to have something to go by there, that things were getting out of hand. We kept talking. Mr. Campbell offered again to accept the old contract. Mr. Ayers said no, that that was the final offer. He said "Take it to them. Take it or leave it."

Q. Now, did you attend the June 1, 1961, meeting of the full membership of your Union? A. I did.

Q. Will you relate what occurred during that meeting?

D. C. Cherry—for General Counsel—Direct

Mr. Clark: Objection.

Trial Examiner: Sustained.

Mr. Statham: May we stipulate my offer of proof would be the same for this witness as for the others?

Trial Examiner: You can make an offer of proof if you want. If you want to offer it that way to shorten it, why—

Mr. Statham: Yes, if we could stipulate that my offer of proof would be identical.

Mr. Clark: Just state your offer of proof is identical, and let it go at that.

Trial Examiner: You can do it that way to save time.

[146] Mr. Statham: Let the record show that I wish to make an offer of proof which is identical to the offer of proof which I made for Witness Elmer Bost.

Trial Examiner: And I will make the same ruling as I made to that witness. I will deny the offer of proof except insofar as you wish to show what propositions were submitted for vote and what the result of the vote was, because I understand Respondent has no objection to that.

Mr Statham: All right.

By Mr. Statham (continuing):

Q. At this meeting, Mr. Cherry, was it or was it not explained to the full membership by the Negotiating Committee that the Union had offered to extend the existing contract for a one year term?

Mr. Clark: I object. Don't answer that question.

Trial Examiner: On what ground?

D. C. Cherry—for General Counsel—Direct

Mr. Clark: I think it is immaterial. It is right back in the same area that you have already ruled on.

Trial Examiner: Read it back to me, please.

(Pending question was read.)

Trial Examiner: I will sustain the objection.

Mr. Statham: On the ground of immateriality?

Trial Examiner: That's right.

By Mr. Statham:

Q. Was there a discussion at this meeting, Mr. Cherry, of what had occurred at the afternoon, May 31st, session between the Union Negotiating Committee and the [147] Company Negotiating Committee on May 31, 1961? A. There was.

Mr. Raphael: What was that answer?

The Witness: There was.

By Mr. Statham:

Q. Was there a full disclosure to the membership as to what—

Mr. Clark: I object. Well, finish your question.

By Mr. Statham:

Q. Was there a full disclosure and report made to the full membership by the Negotiating Committee at this June 1, 1961, meeting as to what had occurred during the afternoon session and the previous sessions between the Union Negotiating Committee and the Company Negotiating Committee on the May 29, 1961, and the May 31st meetings?

Mr. Clark: I object to that question.

Trial Examiner: Sustained.

D. C. Cherry—for General Counsel—Direct

Mr. Clark: May it please the Trial Examiner, in thinking about that question, I am going to withdraw my objection to it.

Trial Examiner: Very well.

Mr. Clark: And allow him to go ahead and answer it.

Trial Examiner: Since the objection is withdrawn, you may answer the question.

The Witness: There was.

By Mr. Statham:

Q. Was there a strike vote taken then at this meeting?

[148] A. Well, it wasn't exactly a strike vote.

Q. What kind of a vote was taken? A. It was a vote to reject the Company's proposal.

Q. Which proposal? A. Pardon?

Q. Which proposal? A. The last proposal that the Company offered, the final proposal.

Q. And what was the Union objecting to in regard to those proposals? A. Well, they was objecting to the clause there that would entice a wage cut.

Q. And are you referring to the clause which provided, in substance, in the Company's proposals that no employee would have a vested right to any level of incentive earnings? A. That's right.

Q. Was that clause discussed at the meeting? A. Yes, sir.

Mr. Clark: I object to that and move it be stricken, that the answer be stricken.

Trial Examiner: I will sustain the objection to the question and I will strike the answer.

By Mr. Statham:

Q. How long have you been a member of the Union, Mr. Cherry? A. About 14 years.

D. C. Cherry—for General Counsel—Direct

[149] Q. And had you served on Negotiating Committees prior to this contract negotiation that we are talking about here today, on May 29th and 31st? A. Off and on, not continuously.

Q. In your opinion, this last proposal which the Company made to the Union about no vested interest in any level of incentive earnings, would that have an effect on the employees of Fort Smith Chair Company, their wages, had they agreed to that provision in the contract?

Mr. Clark I object on the basis he is asking the witness for an opinion. For that reason, it is not competitive evidence. He is no expert and he would be required to draw a conclusion.

Trial Examiner How many years have you been on Negotiating Committees, Mr. Cherry?

The Witness: On the Negotiating Committees, off and on for about four years, I imagine.

Trial Examiner: I think the witness can be asked the question and give his opinion. However, it would be subject to argument as to what weight I should give it. It is an opinion. You may answer the question, Mr. Cherry?

The Witness: Will you repeat the question?

By Mr. Statham:

Q. In your opinion, would the Company's last proposal, as you have testified, providing that no employee would have a vested interest in any level of [150] incentive earnings, in your opinion, would that provision have the effect, or could it have the effect, if the Union agreed to incorporate this in the contract, of giving the Company power to cut wages? A. It could have.

Q. And have you been a Union Steward during your 14 years of Union membership? A. About ten years, yes.

D. C. Cherry—for General Counsel—Direct

Q. And as a Steward, have you engaged in grievances and arbitration over contracts, interpretation of contracts?

A. Yes, sir.

Q. And were you familiar and acquainted with what the provisions of the existing stipulation added as a supplement to your existing contract that expired May 31, 1961? Were you familiar with what the people were entitled to under those provisions? A. Fairly well, yes, sir.

Q. Let me ask you this. What percentage, on the average, of the employees' earnings of Fort Smith Chair Company were comprised of incentive earnings? A. I didn't understand the question.

Q. What percentage of the wages, or what—you know, what money you received from the company in the way of pay, how much was made up of incentive earnings over and above your base rate? [151] A. Oh, around 30 or 35 per cent.

Q. Was this fact—was the effect of this provision discussed by the full membership at this meeting? A. Yes, sir.

Mr. Clark: I object.

Trial Examiner: Sustained.

Mr. Statham: I would like to make an offer of proof, that if the witness were allowed to testify, he would state that this was gone into in quite some detail by the membership and it was expressed by the Union membership that it would allow the Company to cut the wages at its whim or discretion, and with such a provision, therefore, the employees could not live with it.

Trial Examiner: I will reject the offer of proof.

By Mr. Statham:

Q. Did you attend the June 7, 1961, meeting? A. Yes, sir.

D. C. Cherry—for General Counsel—Direct

Q. And other than the Union representatives and the Company representatives, was there some other person present? A. Yes, sir.

Q. And who was he? A. Mr. Wheeler, Conciliator.

Q. Is he a member of the Federal Mediation and Conciliation Service? A. Yes, sir.

Q. What was discussed at that meeting? [152] A. Well, they brought up Mr. Wheeler on pro and con, on both of the proposals that the Company had offered, and what the Union had offered. Then they talked to the Company and then came and talked to us, and—well, that's about all there was to it. We agreed then to meet the next day.

Q. Did the Union renew its offer to extending the existing contract for one year? A. That's right.

Q. Was there any discussion of the Company's proposal of no vested interest in— A. There was some, yes.

Q. And did they ever recede from that proposal? In other words, did they ever offer to drop that demand? A. No, sir.

Q. Did the Union and the Company have any further meetings on contract negotiations after the June 7, 1961, meeting? A. No, sir.

Q. How many employees of Fort Smith Chair Company, to your knowledge, are under this incentive system of pay? Let's say last spring of 1961. A. You mean what percentage?

Q. Yes. A. I imagine around 80 per cent.

Q. Well, now, are you including the office employees in that? [153] A. No, sir.

Q. In other words, the factory workers? A. The ones under the bargaining rule.

Q. Yes, sir.

Mr. Statham: No further questions.

D. C. Cherry—for General Counsel—Cross

Cross-examination by Mr. Clark:

Q. Mr. Cherry, did you take any notes at these negotiating meetings? A. No, sir.

Q. You say you have been on negotiating committees from time to time? A. That's right.

Q. That is, for Local 270. Did you ever give up a concession that the Company has made before? A. Not that I recall.

Q. Did you ever make an offer to go back to work at any time after the expiration date of this contract, that is, June 1, 1961, until June 7th, when you had another session with the Federal Mediator? Did you ever make an offer to go back to work? A. No, sir.

Q. Did you ever go down to the plant during that period of time? A. Yes, sir.

Q. Were the gates locked? [154] A. No, sir.

Q. Mr. Cherry, as far as you were concerned, this dispute that was taking place here between the Company and the Union, the Union was more upset about this vested interest proposition than anything else, is that right? A. There was another proposal there that would have hurt.

Q. What was that? A. Shop Steward meetings.

Q. What about the Shop Stewards meeting? A. Limit the Shop Stewards to only—I mean the Committee, Grievance Committee, to three and meet only one hour in one week.

Q. What had been the practice prior to that? A. Any time we had a grievance we could have one hour for any one grievance.

Q. And how many could it then? A. As many as grieved.

Mr. Statham: What was that answer?

D. C. Cherry—for General Counsel—Cross

Trial Examiner: As many as grieved.

By Mr. Clark:

Q. How many committeemen could attend under the old practice? A. Well, there was no set—

Q. No limit, was there? A. No limit.

Q. How many usually did attend? [155] A. Only the committeeman that was in that department.

Q. Was that true in every case? A. To my knowledge, it was.

Q. Isn't it a fact that on occasions you would have as many as eight committeemen attending such meetings? A. I don't believe there was that many committeemen down there.

Q. Isn't it a fact that you would have, on occasion, more than one or two committeemen attending such meetings? A. We have had as many as three, I know, but that's all.

Q. There would be as many as three? A. That's right.

Q. Have you ever known of any more? A. No, sir.

Q. Well, then, Mr. Cherry, the Company's proposal in that respect was that it didn't represent a change then?

Mr. Statham: I object to that. It seems to be it is argumentative.

Trial Examiner: I think it is argumentative. I will sustain the objection.

Mr. Clark: We have had many questions here asking for an opinion. I thought perhaps he could express one here.

Trial Examiner: It is not a question of asking him to express an opinion. I think you were arguing with him instead of asking him a question.

D. C. Cherry—for General Counsel—Cross

[156] *By Mr. Clark:*

Q. In your opinion, Mr. Cherry, on the basis of your understanding of the proposal, did it constitute a change over the old practice? A. Yes, it would have been some.

Q. All right. Now, Mr. Cherry, to your knowledge, did anyone else offer to go back to work between the period of June 1, 1961, and June 7, 1961?

Mr. Statham: Object to that question as being immaterial as to whether anyone offered to return to work.

Trial Examiner: I will let it in. It is a part of cross-examination. I will let it in. I am allowing him to go where he wants to on cross-examination. Answer the question.

The Witness: Could you rephrase the question?

By Mr. Clark:

Q. Did anyone else, to your knowledge, offer to return to work during the period June 1, 1961, and—

Trial Examiner: Oh, is that the question?

Mr. Clark: Yes.

Trial Examiner: I'm sorry. This is between June 1, 1961, and June 7th?

Mr. Clark: Yes, sir.

Trial Examiner: Well, I am going to let it in, although it is not as clear as—well, answer the question.

The Witness: To my knowledge, no one did.

By Mr. Clark:

Q. That is what I asked, to your knowledge. Did [157] you walk a picket line? A. Yes, sir.

D. C. Cherry—for General Counsel—Redirect

Q. Did you walk the picket line between June 1 and June 7? A. I probably did. I was on Thursday nights. I remember that. Thursday nights until then I walked it.

Mr. Clark: That's all.

Redirect examination by Mr. Statham:

Q. To your knowledge, Mr. Cherry, before you were discharged on May 8, 1961—I mean did the Company give you any advance notice that it was discharging you? I mean June 8th, not May. A. Before June 1st?

Q. Before June 8th, the date on which you were—or did you receive a letter of discharge on June 8th or June 9th? A. I am on a rural route and I probably received mine on June 9th, I believe.

Q. Prior to receiving that letter, did the Company ever give you any advance warning that it would discharge you unless you ceased and desisted from striking? A. No, sir.

Q. To your knowledge, did the Company give anyone—and any of the employees—any warning that unless they ceased striking they were going to be discharged? A. To my knowledge, they never did.

Q. To your knowledge, did the Company advise the Union that, [158] in the Company's opinion, the strike was illegal and that unless they ended the strike they were going to discharge all of the employees and refuse to bargain any further, to your knowledge?

Mr. Clark: I object on the ground that question is immaterial.

Trial Examiner: Read the question, please.
(Pending question was read.)

Trial Examiner: What is wrong with that?

Mr. Clark: Immaterial.

Mr. Raphael: It is obviously material.

Trial Examiner: I am going to let it in. Answer the question.

D. C. Cherry—for General Counsel—Cross

The Witness: To my knowledge, they never.

By Mr. Statham:

Q. Mr. Cherry, how long has some of these employees worked at Forth Smith Chair Company?

Mr. Clark: I object to that. That is most immaterial, not relevant here.

Trial Examiner: What is the materiality of that?

Mr. Statham: I would like to show that without any advance warning at all the Union—I mean the Company—suddenly, without any advance warning, fired employees, some of whom had 30 years seniority with the Company, and refused to bargain any further with the Union.

Trial Examiner: The rights under the Act are the same [159] whether they work for 30 years or three.

Mr. Clark: They are trying to get some sympathy here.

Trial Examiner: I will sustain the objection and you can make an offer of proof if you want, although I do not think it is too material, but if you want—

Mr. Statham: The counsel for the General Counsel would like to make an offer of proof that if Witness Cherry were allowed to answer the question propounded to him, to which an objection was sustained, that—

Mr. Clark: Let me interject this. I think this should be done by question and answer.

Trial Examiner: He can do it either way. That's his choice.

Mr. Clark: I don't think he has the knowledge that he is fixing to put in this record though.

Trial Examiner: Well, you are offering to put it in for this witness?

D. C. Cherry—for General Counsel—Cross

Mr. Statham: Well, either way. I have got a seniority attached to Mr. Ayers' affidavit. If you want to stipulate to its authenticity, I will offer it into evidence and you can object to it and I will read it in as an offer of proof.

Trial Examiner: Will that—handle it that way then. Is that all right?

Mr. Clark: All right.

Trial Examiner: I would like to ask the Company, however, [160] is there any contention by the Company that it gave any advance notice before it sent out these letters?

Mr. Clark: No, sir.

Trial Examiner: No question on that?

Mr. Clark: No, sir.

Trial Examiner: Maybe that will save time then.

Mr. Statham: In order to get—could we go off the record for just a minute?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Statham: If Mr. Cherry were allowed to answer the question propounded to him, which was objected to and sustained by the Trial Examiner, he would testify that some of the employees of Fort Smith Chair Company—several employees of Fort Smith Chair Company—have worked over 20 years with the Company, up to 29 years, continuously with the Company.

Trial Examiner: The offer of proof is denied, rejected in its entirety.

Mr. Statham: I'm sorry, I left out something material.

Trial Examiner: All right.

Mr. Statham: And my offer of proof should include the fact that these employees were among

D. C. Cherry—for General Counsel—Cross

those who were discharged by the Company for participating in the strike.

Trial Examiner: The offer of proof is rejected in its [161] entirety. This sort of thing might be material in an ordinary 8(a)(3) case, where the question is whether an employee violated a rule or made a mistake, where this pretext was ceased upon, then I think in that case how long he had worked might be very material.

Mr. Statham: I agree with you, but—

Trial Examiner: In this case, I can't see that. This case is purely one of law, a question of whether this was a legal strike or illegal strike.

Mr. Statham: I don't know whether the term "illegal"—

Trial Examiner: Protected—let's use the word protected. The question is whether the strike was protected or wasn't protected, and I can't see how long an employee had worked for the Company can affect the answer to that question.

Mr. Statham: Well, here's my point, if I may explain it. I agree with you that if an employer ceases upon a technicality in discharging an employee with many years of seniority in an 8(a)(3) case it is material. I would like to point out this is an 8(a)(3) case, that they did cease upon a technicality without trying to resort to other remedies available to them. I think—

Trial Examiner: Is that important?

Mr. Statham: May I continue? I think there is a grave question here as to whether or not this technicality applied in this case.

[162] Trial Examiner: That is the issue. The issue is not the Respondent's motive, as I see it, in using this section of the Act, but whether, in fact, it needed to be complied with.

D. C. Cherry—for General Counsel—Redirect

Mr. Statham: Well, all right. That's your ruling.

Trial Examiner: Let's proceed.

Mr. Statham: I have no further questions.

Mr. Youngdahl: No questions.

Mr. Raphael: I have just one question.

By Mr. Raphael:

Q. Mr. Cherry, Mr. Clark asked you concerning the vested interest clause. You recall that was the Company proposal that the employees were not to have a vested interest in an incentive standard. Do you remember that?

A. Yes, sir.

Q. Mr. Clark asked you about that clause, sir, just a few minutes ago, and he said, or suggested in a question to you, that the people were more upset about that clause than any of the other proposals made by the Company. Do you remember him asking you that question? A. Yes, sir.

Q. That is true, is it not, that the people were more upset about the vested interest clause than any other company proposal? Yes or no? A. Yes, sir.

Mr. Clark: I object to that question.

[163] Trial Examiner: I will sustain the objection. Do you want to make an offer of proof as to how he would answer?

Mr. Raphael: No.

By Mr. Raphael:

Q. There was some suggestion about the meaning of the Company's vested interest proposal. Was that not at the June 1st meeting?

D. C. Cherry—for General Counsel—Redirect

Mr. Clark: Object to that question on the grounds it is leading.

Trial Examiner: I have ruled on that many times. Sustain the objection.

By Mr. Raphael:

Q. Was there a discussion about that clause in the June 1st meeting? A. Yes, sir.

Q. Was an explanation given at the June 1st meeting about the meaning of the no vested interest?

Mr. Clark: I object to that question.

Trial Examiner: Sustain the objection.

Mr. Raphael: On what ground, Mr. Examiner, under the previous ground, immateriality?

Trial Examiner: Yes, sir.

Mr. Raphael: Well, now, on that score, if the Examiner will bear with me, I know you have had a ruling—you have made a ruling—and I don't propose to speak for the General Counsel, and I can't help reverting to the ruling and its impact on the issues. If you will bear with me, I would like [164] to be heard very briefly on why I think the occurrences at the June 1st meeting ought to be allowed in. There is some evidence in now. I think Mr. Clark brought it out on cross examination of Mr. Campbell.

Mr. Clark: I object. I would like to straighten that out right now.

Trial Examiner: We have been over that so many times, Mr. Raphael. I will hear you, but please make it brief.

Mr. Raphael: Well, no matter how many times we go over it, I think you will agree with me that there is a considerable amount of complexity in the semantics of Section 8(d).

D. C. Cherry—for General Counsel—Redirect

Trial Examiner: No question about that.

Mr. Raphael: All right. Now, what we are talking about, as you have just indicated, is whether this was an illegal strike or a legal strike.

Trial Examiner: I changed that to protected.

Mr. Raphael: Whether it was protected or not protected.

Trial Examiner: I think that is the issue here.

Mr. Raphael: Now, you mentioned before that what took place at these meetings in the presence of the Company is, of course, allowable and we, of course, understand that position. But we seriously and strenuously urge that what took place at the meeting at which the Union voted to go out on strike, or at least the employees did, is of incisive significance to what you have described as the critical issue [165] in this case, for this reason. It is true that a statement made by a Union representative in the presence of an employer representative is admissible, if relevant, because the employer is there and hears it. It is also true, it seems to me, that it is not necessary to have an employer representative present when the Union people discuss among themselves the reasons why they go out on strike, for the simple reason that we are not talking about, in that context, a communication to an employer in a collective bargaining session, a refusal to bargain, and none of those things are involved in that situation. We are talking about why people engage in, or propose to engage in, concerted activity. So the mere fact that there had been bargaining sessions doesn't mean, as we see it, that only those statements made in the course of a bargaining session is admissible, because the employer representative is present. For example, if, after a long series of

D. C. Cherry—for General Counsel—Redirect

bargaining sessions, the employees, after reporting on the bargaining sessions, then decided to go out on strike because instead of getting pay checks in American money they wanted it delivered in opium—a fantastic example. They might have discussed that at a meeting, and if they struck in order to reach that illegal objective, it wouldn't be a legal strike. If they struck because the employer had been engaged in unfair labor practices, then whether the Complaint says, or does not say, the employer [166] was engaging in unfair labor practices before the strike started, but if, in fact, they were so guilty before the strike started, then what took place at the meeting to demonstrate that the employees struck because of the unfair labor practices would certainly be relevant.

Trial Examiner: It might be if the contention here were that there was an unfair labor practice involved, but that isn't the situation.

Mr. Raphael: Now let me bring it down one step further. If the employees, considering the context of whether this is protected or not protected, legal or illegal activity—if the employees, and all of what took place in the bargaining sessions, and everything that took place at the June 1st meeting, and all of the discussions, came to the judgment, and that is fairly inferable, that this was a final, conclusive, "take it or leave it" last offer, and they were just a few minutes away from the termination, or the termination had already passed, and there was no other possibility of getting together with this employer, as I think the evidence well shows already, and I think the employer won't deny that he was insisting on this clause—that seems to be conceded all the way through—therefore, we are entitled to

D. C. Cherry—for General Counsel—Redirect

show that at the June 1st meeting, when they were talking about this situation, they went out on strike in rejection of the Company's proposal and not for the purpose of modifying or terminating a contract. [167] Now, that—

Trial Examiner: It already shows they took a vote on whether to accept it or—

Mr. Raphael: That is a more enormous difference, it seems to me, on the very critical issue that you, yourself, pose, namely, was it protected or not protected.

Trial Examiner: You have the evidence of what they voted on and the result of that vote.

Mr. Raphael: I think, Mr. Examiner, the question in any case, whether what I do in concert with others is protected or not protected, what I say I do or what I say I will probably do, is just as admissible as if a group of people were to engage upon a plan or a course of contact among themselves, and you were to elicit that testimony and find out whether their concert of activity is an illegal conspiracy or a concerted action to achieve a lawful objective. There is no other way to get that evidence except by eliciting it and allowing it to be presented out of the meeting at which they agree upon the concert of activity.

Trial Examiner: Well, I think—

Mr. Raphael: The question to this whole problem is, is this concert of activity lawful or unlawful? People, when they engage in a proposed plan or concert of activity, do it among themselves. They don't go to the employer and say they are going to do it.

[168] Mr. Clark: I think Mr. Raphael is arguing his case now.

D. C. Cherry—for General Counsel—Redirect

Mr. Raphael: The reason why I did it, Mr. Clark, in fairness to you and in fairness to the Examiner, is that I am very much concerned. I am not concerned about anything other than this one simple thing. If we can make offers of proof here from now until Kingdom Come, there is no offer of proof that will enable you or the Board to make a finding of fact, and rightly and justly so. I would say that same thing if I were in Mr. Clark's position. I don't want anybody making a finding of fact in any case if I don't have a chance to cross examine that witness. Now, if we go through all this and we are missing something out of those meetings that ought to be in this record, then the lives—and it is important to the Company, too—and a month from now you issue your report, or two months, depending on how busy you are. Then one or the other will be dissatisfied and go to the Board in Washington, and then starts unwinding a long, expensive and protracted—

Trial Examiner: Mr. Raphael, I think that, in order for you to avoid that possibility, you should take an interlocutory appeal to the Board in Washington by telegram right now.

Mr. Raphael: I won't do that.

Trial Examiner: I have ruled that it not coming in.

Mr. Raphael: Well, I think you have made an error on a very important point, where we could quickly put the evidence [169] in without unduly prolonging the hearing and, at the same time, avoiding all of the dangers involved.

Trial Examiner: Maybe you can get the Board to decide that now. But the point I want to make is this, that I am allowing the fact that at that meet-

D. C. Cherry—for General Counsel—Redirect

ing a certain proposition was put to the voters and they voted in a certain way. Now, I think that speaks for itself. I am not concerned with what speeches were made before they took that vote. I am not concerned with what they were told or what they weren't told. I am concerned with the fact that they took a vote and decided on a course of action, and I am concerned with exactly what course of action they voted to take. I think that has a materiality.

Mr. Raphael: I think that is material, too, but it does not include enough. Let me point out one more thing. You have a group of Union people who aren't lawyers drafting a very short proposal on which to vote. You are then saying that is conclusive.

Trial Examiner: No, no, I didn't say that at all. I said it is material.

Mr. Raphael: Then what you are saying, if you don't allow the discussions which were made before this vote to see what the people were thinking, then what you are saying is that we don't care what was discussed or what was considered; only what they put down on the strike vote, that is [170] binding, because we don't take into consideration what was considered by the people. Now, here, in this case, we have a very short statement—do you want to accept the company's proposals? What if they would have said "do you want to go on strike"? instead of saying that? Would that mean the strike had no purpose at all?

Trial Examiner: Your contention is that they were asked to vote on the proposition of whether to reject or accept the company's proposal?

Mr. Raphael: Pardon?

Trial Examiner: You are saying—you are trying to prove what they voted on was to accept or reject the company's final offer?

D. C. Cherry—for General Counsel—Redirect

Mr. Raphael: Yes, sir, but—

Trial Examiner: Suppose it was something else?

Mr. Raphael: I am not—

Trial Examiner: You are trying to prove it. I am allowing you to prove it. The only thing I want to—all the talk and discussion that went on before the vote, I don't want all that in. I think it is immaterial. The vote is what counts.

Mr. Raphael: That is my position. They were voting upon the Company's attempted modifications, but I want to prove that they had also considered that they have got a situation where they were trying to extend the contract, [171] and they said "we either are going to have to extend the contract, but we have got these three—we have these three alternatives"—well, I don't want to say that. What I am trying to say is this, that it was considered that they had withdrawn their modifications. They weren't striking for their own modifications because they had dropped those. The only thing they were striking for was the Company's modifications.

Trial Examiner: You can show all that through the negotiations. You have shown—you have attempted to show what went on in the negotiations. Mr. Raphael, do you have any further questions of the witness?

Mr. Raphael: No, sir, I am finished, thank you.

Trial Examiner: Any further questions?

Mr. Youngdahl: Just one more. Well, just a moment.

Trial Examiner: I have a few questions. Shall I go first?

Mr. Youngdahl: Yes, sir.

Trial Examiner: Now, Mr. Cherry, I show you General Counsel's Exhibit 8, a letter addressed to Mr. Clyde Bearce by the Company. I would like

D. C. Cherry—for General Counsel—Redirect

to have you glance at that and tell me whether you received an identical letter.

The Witness: I did.

Trial Examiner: I think it is already covered by stipulation that he received it. My next question is the picketing, of which you spoke began on June 1st, did it?

[172] The Witness: Yes, sir.

Trial Examiner: And extended until December 14, 1961?

The Witness: That's right.

Trial Examiner: Now, my next question to you is whether you personally, or through the Union, ever communicated to the Company your willingness to return to work?

The Witness: Prior to—

Trial Examiner: That you know of?

The Witness: Prior to the 14th?

Trial Examiner: No, at any time. Did you on the 14th or any time since?

The Witness: There was a vote taken that we would call off the strike.

Trial Examiner: There was?

The Witness: Yes, sir.

Trial Examiner: Now, again I am going into something that wasn't covered on direct and if there is any objection I will refrain, but I would like the facts on this, if there is no objection. That vote was taken at a Union meeting?

The Witness: Yes, sir.

Trial Examiner: What was the date of it?

The Witness: June 14th.

Trial Examiner: You—

Mr. Statham: June 14th?

Trial Examiner: You mean December 14?

D. C. Cherry—for General Counsel—Redirect

[173] The Witness: Yes, 1961.

Trial Examiner: June 14, 1961?

The Witness: Yes, sir.

Trial Examiner: The vote was to abandon the strike, is that what it was?

The Witness: Yes, sir.

Trial Examiner: No more picketing after that. Do you know whether or not after a vote was taken the Union communicated the result of that vote to the Company? Will there be testimony to that effect?

Mr. Clark: I assume so.

Mr. Youngdahl: I am sure we can stipulate on it.

Trial Examiner: I would like for the record some time—it doesn't have to be now or through this witness—but I would like somebody to put that in later on.

Mr. Statham: We will put it in.

Trial Examiner: All right. Any further questions of this witness? If there are no further questions, you are excused, Mr. Cherry.

Mr. Statham: I want him to identify one thing.

Trial Examiner: All right.

Mr. Clark: May I see it first?

Mr. Statham: Yes, sir.

Trial Examiner: I have got one other question. Since you received this letter that I showed you, have you actually [174] gone back to work for the Company?

The Witness: No, sir.

Trial Examiner: Mr. Youngdahl indicated he had some questions earlier.

Mr. Youngdahl: Mr. Statham is going to handle it.

Trial Examiner: All right.

D. C. Cherry—for General Counsel—Redirect

By Mr. Statham:

Q. Have you offered to return to work? A. No, sir.

Mr. Raphael: He means any time or—

A. Oh, pardon me.

Trial Examiner: Do you want to change your answer?

The Witness: Through the Local, yes.

Trial Examiner: Through the Union you have, but you haven't personally?

The Witness: Not personally, no.

By Mr. Statham:

Q. I hand you what has been marked for identification as General Counsel's Exhibit 9 and ask you to identify that.

Trial Examiner: Excuse me, 9 was the letter of June 8, 1961.

Mr. Statham: I beg your pardon.

By Mr. Statham:

Q. I hand you what has been marked for identification as General Counsel's Exhibit No. 10, and ask you to so identify that document. A. This is a ballot that was taken, secret vote on the [175] Company's proposal.

Trial Examiner: May I break in to ask when? Is this the Union meeting on December 14th?

The Witness: June 1st.

D. C. Cherry—for General Counsel—Recross

By Mr. Statham:

Q. 1961, of course? A. 1961.

Mr. Statham: I offer in evidence Exhibit 10. I will produce a duplicate of it before the hearing ends.

Trial Examiner: Is there any objection to the receipt of General Counsel's Exhibit 10?

Mr. Clark: No objection.

Mr. Youngdahl: No objection.

Trial Examiner: In the absence of objections, General Counsel's Exhibit 10 is received in evidence, with the understanding that a duplicate will be submitted before the close of the hearing.

(Thereupon, the document heretofore marked General Counsel's Exhibit 10 for identification was received in evidence.)

Trial Examiner: Is that all?

Mr. Statham: Yes, I am through with this witness.

Recross-examination by Mr. Clark:

Q. Mr. Cherry, were these ballots passed out to the members there at the meeting? A. No, sir, they was on a check-off list. When they called [176] their name, they came up and got their ballot.

Q. They came up to get the ballot? A. That's right.

Q. When were these ballots made up? A. I really don't know.

Q. Were they—they are mimeographed. Do you know when they were mimeographed? A. No, sir, I don't.

Q. Now, you were present at the May 31st meeting, were you not, when Mr. Campbell was asking Mr. Ayers to

D. C. Cherry—for General Counsel—Recross

make him an offer? You previously testified to that? A. I was there, yes, sir.

Q. Did Mr. Campbell make a statement at that meeting that the proposals made by the Company, that he would take them back and recommend them or not recommend them? A. He said if they would give a proposal of the old contract.

Q. I didn't ask you that. I am talking about the proposals that were given to Mr. Campbell.

Trial Examiner: The written ones?

By Mr. Clark:

Q. The written ones, Mr. Cherry. A. I don't recall anything of it.

Q. Did you make any statement at that time whether you would recommend it or not recommend it? A. No, sir.

Q. Do you remember whether Mr. Campbell made any statement at [177] that time that he would not recommend these proposals? A. No, I don't recall it.

Mr. Clark: That's all.

Trial Examiner: Any further questions of this witness?

Mr. Statham: No, sir.

Trial Examiner: Thank you very much, Mr. Cherry.

(Witness excused.)

Trial Examiner: We will go off the record a minute.

(Discussion off the record.)

Trial Examiner: On the record. We will take a five-minute recess.

(Short recess was taken.)

Trial Examiner: The hearing will come to order. Next witness.

Clyde Bearce—for General Counsel—Direct

CLYDE BEARCE, a witness called by and on behalf of the General Counsel, having first been duly sworn, was examined and testified as follows:

Direct examination

Trial Examiner: State your name and address.

The Witness: Clyde Bearce, Muldrow, Route 2, Box 3.

By Mr. Statham:

Q. Mr. Bearce, where are you employed? A. Acme Spring.

Q. Have you ever been employed by the Fort Smith Chair Company? [178] A. I have.

Q. And during that period of time did you work for that company? A. November 15, 1939, until June 8, 1961.

Q. And during what period of time did you work for that concerted work stoppage?

Trial Examiner: Well, the letter—

Mr. Statham: I will strike that. That has been admitted—pardon me.

Mr. Raphael: Mr. Bearce, I think you said 1960; you meant 1961?

The Witness: 1961.

By Mr. Statham:

Q. I hand you what has been identified as General Counsel's Exhibit No. 9, offered in evidence, and I ask you whether or not you received an identical letter addressed to you? A. I have. This is my letter.

Q. When did you receive it? A. I believe it was after—see, I live out on the route and it is a day late, I believe. I got it a day later.

Clyde Bearce—for General Counsel—Direct

Q. Well, you mean a day or two after June 9, 1961. That is your answer? A. Right.

Q. Did you serve on the Union Negotiating Committee in meetings with the Fort Smith Chair Company on May 29th and [179] May 31st, 1961? A. I did.

Q. And did you attend both the meetings? A. I did.

Q. Would you please relate what occurred during the afternoon session of the May 31st meeting? A. We got back at the Ward after lunch, at which time we offered our proposals, you know, and we decided to drop all the proposals, including the money, and we—because the Company stated that, you know, under the circumstances it wasn't able to give a raise, so we decided to drop all of those proposals, if we could just get our old contract back. We would either take the two proposals that we had agreed upon or drop them, whichever they chose to do.

Q. And what did the Company do during that meeting? A. Well, it was getting, I would say, on near to 3:00 or 3:30. They had taken a break and during that break, why, they came back—this was after we presented the proposal—and so they came back after the break and they handed Mr. Campbell—they wrote out their proposals on this, and they gave it to him and he insisted that they would drop those proposals that we had turned down before, and that we could get a contract if they would just give us the old contract, just as it was. So Mr. Ayers says, "Well, there's some things in this we need." Mr. Campbell, he kept insisting that he believed the [180] people would buy this old contract just as it was. It was getting late and we needed to let our people know by quitting time that afternoon. He wanted to let them know if we could have the old contract, or give them some definite answer to that effect. So we did this—he did this. Mr. Ayers give this proposal to Mr. Campbell. He said, "This is the proposal, take it or leave it." And Mr. Campbell said, "Well, I don't believe my

Clyde Bearce—for General Counsel—Direct

people will accept it," he said, "because in here you have no vested right to incentive plans." So we carried it back to them and they turned it down.

Q. And did you attend that meeting on June 1, 1961, of the full membership? A. I did.

Q. Would you please relate what occurred during that meeting?

Mr. Clark: Objection.

Trial Examiner: Sustained.

Mr. Statham: Again, if I may make an offer of proof, which is identical to the offer of proof which I made for Mr. Bost and Mr. Cherry, in response to this same question to which an objection was sustained.

Trial Examiner: And I will make the same ruling then, that I will reject all of it except I will permit you to show what proposition was voted on and the result of the vote.

Mr. Statham: Yes, sir.

By Mr. Statham:

Q. Was there a vote taken during the meeting? [181]

A. At the Local?

Q. Yes, on June 1, 1961. A. There was.

Q. Prior to that vote of the full membership, did the Negotiating Committee explain to the full membership what had occurred during the bargaining negotiations with the Company on May 29th and 31st, 1961?

Mr. Clark: Objection.

Trial Examiner: Sustained.

Mr. Statham: I would like to make an offer of proof. If the question were allowed to be answered by the witness, Mr. Bearce, to which the objection

Clyde Bearce—for General Counsel—Direct

was sustained, he would testify yes, it was explained in detail to them.

Trial Examiner: Isn't that covered by your previous offer of proof?

Mr. Statham: Yes, but I think—

Trial Examiner: I will reject the offer.

Mr. Statham: The only reason in asking that question, it's a much shorter one, and it seems to me it wouldn't be possible to object to it on the grounds of immateriality, and it would not, you know, take much time.

By Mr. Statham:

Q. What was the result of the vote? A. I believe it was 125 against the proposal and 22 for it.

Q. What proposal are you referring to? A. The one where it was take it or leave it. I mean this [182] invested right to incentive earnings.

Q. You refer to the last offer made by the Company on May 31, 1961? A. Yes, sir.

Q. In regard to the no vested rights in any level of earnings? A. Yes, sir.

Mr. Clark: Object to leading the witness.

Trial Examiner: I will sustain the objection.

By Mr. Statham:

Q. I hand you what has been marked for identification as General Counsel's Exhibit 10, and would you state what that is, please? A. This is a ballot in which we voted upon.

Mr. Clark: I object to this testimony, if the Trial Examiner please, on the basis that it is accumulative—the same thing that has already been testified.

Clyde Bearce—for General Counsel—Direct

Trial Examiner: It is accumulative, but I am going to allow it.

Mr. Clark: All right, sir.

Trial Examiner: This is only the second time. This is the only—this is only the second witness that has been asked about this.

By Mr. Statham:

Q. Your answer was that it was the ballot that was used on the vote which you have previously referred to? A. Yes, that happened on June 1st.

[183] Q. What year? A. 1961.

Q. By the full membership of the Union, is that correct? A. Yes, sir.

Q. Did you attend the June 7, 1961, meeting? A. I did.

Q. The negotiating meeting? A. I did.

Q. And the Union Negotiating Committee was there and the Company Negotiating Committee was there. Was there anyone else present? A. There was.

Q. And who was present? A. Mr. Wheeler.

Q. And do you know by whom Mr. Wheeler is employed, or who he represents? A. Conciliation Board, I believe.

Q. Federal Mediation and Conciliation Service? A. That is right.

Q. Would you relate what occurred during that meeting? A. Well, during that time, why, he talked to both the Union and management. He asked me, he says, "was there any money involved?" I said, "No, we voted and wanted the old contract, just as it was, if we could get it." I told them there was no money.

[184] Mr. Clark: I object to those conversations outside the presence of the Company.

Clyde Bearce—for General Counsel—Direct

Trial Examiner: Let's find that out, Mr. Bearce. Was that conversation between you and Mr. Wheeler in the presence of the Company representatives?

The Witness: That was when he was talking to us. You know, he was talking to us and then he would go and talk to the Company.

Trial Examiner: Then your answer is no?

The Witness: No, there was no money involved. We were not asking for a raise.

Mr. Statham: I think, in all fairness, that the Company was not present during that time, but I would like to point out that what he said to the Federal Mediator is not hearsay as to what he said.

Trial Examiner: I will sustain the objection. Strike the answer.

Mr. Statham: On what ground, if I may ask?

Trial Examiner: On the ground that what went on between the Mediator and the Union in the absence of the Company is immaterial.

Mr. Statham: Well, I would like—

Trial Examiner: The negotiations are between the Company and the Union.

Mr. Statham: I would like to point out that it does [185] prove that the Union was not retracting their request of the Company to go along with the existing contract for another year.

Trial Examiner: The contract between the Union and the Company would be the acid test of that.

By Mr. Statham:

Q. Would you continue, Mr. Bearce, but limit your answer as to what was discussed between the—or in the presence of the Company's Negotiating Committee. Do you understand what I mean? A. No. Repeat that.

Clyde Bearce—for General Counsel—Direct

Q. I would like for you to testify as to what occurred during the June 7, 1961, negotiating meeting while the Company and the Union and the Mediator were jointly discussing the negotiations. A. Well, he just asked what was the difference, and so it was just Mr. Louie Campbell, and he told him, and then—

Q. What did he tell him? A. He told him that we had agreed upon to drop all the proposals and just go back with the old contract as it was, and he says there was no money involved.

Q. Okay, continue. A. So we—so it just rocked forth, you know, backwards and forwards that-a-way. He would talk to the Company and then he would come and talk to us, and there wasn't no decision made until we set a meeting up for the next day at 1:00 o'clock [186] and him present.

Q. During this meeting, did the Company ever drop its demand for a contract including a clause to the effect that no employee had a vested interest in any level of incentive earnings? A. No, they never dropped it.

Q. Prior to the time—to the date on which you were discharged, did the Company ever advise you, or warn you, or notify you, that if you did not return to work and stop your work stoppage that it was going to discharge you? A. No.

Mr. Clark: Object to that question.

Trial Examiner: On what ground?

Mr. Clark: And I move to strike the answer from the record, on the ground it is most immaterial as far as the issues are concerned here.

Trial Examiner: No, I don't think it is immaterial. The allegations are that this man, among others, was discharged on June 8th, and I think anything that happened up to the date of the discharge—at least up to the date of his discharge—is material. I will deny the motion.

Clyde Bearce—for General Counsel—Direct

By Mr. Statham:

Q. To your knowledge, did the Company ever warn, notify or advise any of the employees participating in this work stoppage, prior to their date of discharge, that if they did not discontinue their work stoppage and return to [187] work that they would be discharged? A. No.

Trial Examiner: I thought there was no argument over this.

Mr. Clark: That is what he asked in the first place, which I objected to.

Trial Examiner: I thought there was no contention—

Mr. Statham: Well, maybe we could stipulate. Would you stipulate that none of the employees who were discharged for participating in the work stoppage were warned in advance that if they did not discontinue the work stoppage and return to work that they would be discharged?

Mr. Clark: I can't stipulate to that.

Mr. Statham: Would you stipulate that prior to June 8th, prior to the time that these letters were sent out on June 8th, which is General Counsel's Exhibit—

Trial Examiner: Exhibit 7.

Mr. Statham: Exhibits 8 and 9?

Mr. Clark: I can't stipulate to that.

Trial Examiner: All right, let's proceed.

Mr. Statham: Are you contending they did? Well, that's not a fair question—excuse me. Maybe we can get a stipulation here. Is it your contention that some of the employees were warned that they would be discharged?

Mr. Bethell: The whole meeting was told on June 7th if the notice had not been sent that it was

Clyde Bearce—for General Counsel—Direct

our position that the [188] strike was an illegal strike. We did not add that everybody was going to be discharged, but the entire group was told on that date, with Mr. Wheeler in the room and the whole committee in the room, that at this moment we had not finally confirmed whether or not these notices, in fact, had been received. We were in the process of investigating, and we told them if they had not been sent and had not been received, that it was our position that the strike was illegal. Now, we did not add to that "we are going to send everybody a termination letter," because, as a matter of fact, it had not been decided at that point.

Trial Examiner: I may reconsider my ruling. It is the contention of the Respondent that it is immaterial whether they sent a warning or not. I let it in on the ground that anything that happened prior to the discharge was material, but now I am not so sure. I will reverse my ruling. I will let it in, but I am not so sure it is important. I think the important question is whether the strike itself was protected, and whether it—well, I want to think about that a little bit. I will let it in. Let's proceed.

Mr. Statham: Isn't it also true that the Union was not advised on June 7th, during the June 7th meeting, that if they didn't discontinue the work stoppage that the Company would refuse to bargain with the Union further?

Mr. Bethell: Nothing was said in those words at that [189] time, at that meeting. I said just what I got through telling you. I said that if notices hadn't been sent, certainly, and perhaps if it hadn't been received, we would then consider this an illegal strike. Now, we didn't try to describe the conse-

Clyde Bearce—for General Counsel—Direct

quences of that—what the consequences of that might be.

Mr. Statham: All right.

By Mr. Statham (continuing):

Q. After June 8, 1961, were you ever advised by the Company that if you discontinued your illegal—what they considered to be an illegal work stoppage, or let's say work stoppage, that you could return to work at the Fort Smith Chair Company? A. No.

Q. To your knowledge, were any of the employees ever so notified or advised by the Company?

Mr. Clark: I renew my objection.

Trial Examiner: Now, an issue framed by the pleadings as to certain named individuals and as to whether or not they were ever rehired, and the circumstances of their rehire, is, therefore, an issue, and if it is limited to the employees named in that section I will permit your question.

Mr. Statham: Now, I think we could save some time on that right now by this clarification. Isn't it true that none of the employees were reinstated, but re-employed as new employees?

[190] Mr. Clark: Are you asking that question of us?

Mr. Statham: If we can agree to that.

Trial Examiner: Do you want to go off the record to compose a stipulation? We'll go off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Bethell: We propose to stipulate that any employee of Fort Smith Chair Company who received a notice, or letter of termination, under date

Clyde Bearce—for General Counsel—Cross

of June 8th, or any subsequent date, who was thereafter employed by the company, has been employed as a new hire.

Trial Examiner: Do you join in that?

Mr. Statham: Yes, sir.

Mr. Youngdahl: The charging party does.

Mr. Raphael: Yes.

Mr. Youngdahl: Let me also propose to stipulate at this time, to eliminate what the Trial Examiner probably considers still as an issue framed by the pleadings, that the employees named in Paragraph 7 of the Answer were, in fact, rehired by the Company, and since that time there have been more rehired by the Company on the same basis as the last stipulation.

Trial Examiner: As a new employee?

Mr. Youngdahl: Yes, sir.

Trial Examiner: And the General Counsel, in view of that stipulation, is seeking to reinstate every one in the Complaint [191] then, including those who have since been taken back as a new employee?

Mr. Statham: Yes, sir.

Trial Examiner: They should be restored, you argue, to a status as a former employee?

Mr. Youngdahl: Yes, sir.

Trial Examiner: All right, proceed.

Mr. Statham: No further questions.

Cross-examination by Mr. Clark:

Q. Mr. Bearce, did you take any notes during these meetings? A. No, sir.

Q. Did the Union, at the meeting of June 1, 1961, take a separate strike vote? A. Repeat that. I don't follow you just—

Clyde Bearce—for General Counsel—Cross

Q. Did the Union, at the meeting of June 1, 1961, take a separate strike vote? A. No, sir.

Q. You have been working for this company for quite a long time, Mr. Bearce. Have you served on negotiating committees before? A. No, sir.

Q. Were you familiar with the financial condition of this company, the fact that the company had been losing money. A. No, sir. All I know is what they stated.

[192] Q. At this meeting of June 7th, Mr. Bearce, where the Federal Mediator was present, did you recall—do you recall whether or not the meeting started off with a discussion as to whether these notices had been sent by the Union to the Mediation Service and to the State Labor Board?

Mr. Statham: I object to that question.

Trial Examiner: May I have the question, please?

(Pending question was read.)

Mr. Statham: I object to the question. It is immaterial. We have stipulated that the Mediation Services did not receive a notice from Local 270. I don't see the materiality of the question.

Trial Examiner: I am going to let it in. Answer the question.

The Witness: I don't recall whether it started off with that or not.

By Mr. Clark:

Q. Was the discussion had? A. Seemingly, it was.

Q. Was it or wasn't it? A. It was.

Q. Well, do you remember Mr. Bethell making the statement at that meeting to the effect that if this was an illegal strike that the situation might be different? A. No.

Clyde Bearce—for General Counsel—Cross

Q. You heard the stipulation we entered into here just now [193] which Mr. Bethell dictated into the record? A. I heard that.

Q. Do you remember him making that statement, or a similar statement?

Mr. Youngdahl: I object. That is not a characterization of what Mr. Bethell said, No. 1; and No. 2, it was not a stipulation. What Mr. Bethell said is not what you just quoted to the witness.

Trial Examiner: Let me hear the question.

(Pending question was read.)

Mr. Clark: I will rephrase the question.

By Mr. Clark:

Q. Do you remember Mr. Bethell making this statement at the June 7th meeting, that if the notices were not sent and received by the Union, that—or received by the Mediation Board and the State Labor Board—that this was an illegal strike? A. I don't recall it.

Q. In other words, you are just remembering everything from the Union's standpoint that you care to and forgetting about the rest?

Mr. Statham: Of course, we object to that.

Trial Examiner: Overruled. Answer the question.

The Witness: I don't follow it. Will you repeat it?

By Mr. Clark:

Q. I say, in other words, you are just recalling the facts that are in favor of the Union and [194] forgetting about everything else?

Clyde Bearce—for General Counsel—Cross

Mr. Raphael: I object. He is badgering the witness.

Trial Examiner: I don't think so. I will overrule the objection. Answer the question.

The Witness: I just still don't follow you on that. Ask me again.

By Mr. Clark:

Q. Mr. Bearce, I have asked you some questions here about what certain company representatives stated at the June 7th meeting, and you don't remember what they said.

Mr. Statham: I object to that question. I think, again, he is badgering the witness.

Mr. Raphael: And I have an objection, that the form of words put to the witness by Mr. Clark is not a question. If you read it, Mr. Clark, you will see.

Trial Examiner: I will sustain the objection to the form.

Mr. Clark: All right.

By Mr. Clark:

Q. Now, Mr. Bearce, I am going to ask you one more time. Do you remember Mr. Bethell making a statement at the June 7th meeting that if these notices were not sent by the Union and received by the Federal Mediation Service and State Labor Board that that was an illegal strike?

Mr. Statham: Objection.

Trial Examiner: Overruled. Answer the question.

The Witness: I don't remember it.

Clyde Bearce—for General Counsel—Cross

By Mr. Clark:

Q. So, in other words, you remember the statements [195] that were made in favor of the Union's position in this matter, but you don't remember any statements made in favor of the Company's position?

Mr. Statham: Objection. I don't think the witness has to be subjected to this on the witness stand and, although it is said in a nice enough way by the attorney, I still think it is badgering the witness.

Trial Examiner: Overruled. Answer the question.

The Witness: Repeat that again.

Mr. Clark: I'll have it read to you.

(Pending question was read.)

Mr. Statham: This man is not a lawyer, and—

Trial Examiner: I am going to let him to try to answer it. To your best recollection, what is your answer to the question?

The Witness: I don't remember it being said.

By Mr. Clark:

Q. Mr. Bearce, have you ever known this Local 270 to propose a contract to the Company, in which they surrendered a concession the Company had already made?

A. I don't remember it if they did.

Q. All right.

Mr. Clark: No further questions.

Trial Examiner: Redirect?

Mr. Raphael: That's all.

Trial Examiner: Mr. Bearce, have you ever worked for the [196] Company since June 8th, since you received this letter?

Clyde Bearce—for General Counsel—Cross

The Witness: No.

Trial Examiner: Have you individually made any contact with the Company, or any application or any communication as an individual?

Mr. Statham: I am going to respectfully object to the Trial Examiner's question, in that it is unnecessary for him to make an individual request and, therefore, it is immaterial.

Trial Examiner: All right, I will withdraw it. The Union's request is going to be put in, is it?

Mr. Statham: Yes, sir.

Trial Examiner: All right, I withdraw it.

By Mr. Clark:

Q. Did you ever offer to go back to work on an individual basis between June 1, 1961, and June 7, 1961? A. I did.

Q. Who did you make that offer to? A. Mr. Martin.

Q. Who is Mr. Martin? A. Personnel manager.

Q. When did you make it? A. I believe the 21st day of December.

Mr. Clark: That's all.

Trial Examiner: I think there was a misunderstanding about the dates.

Mr. Raphael: Yes, but the answer makes it clear.

[197] Mr. Statham: Let's make it clear. During the—between the dates of June 1, 1961, and June 7, 1961, did you, during that period of time, offer to return to work for the Company?

Mr. Youngdahl: In the first week of the strike, did you offer to go back to work—the first week of the strike?

The Witness: No.

Colloquy of Trial Examiner and Counsel

Trial Examiner: The first week, that is what you asked?

Mr. Clark: Yes, sir.

The Witness: I misunderstood.

Mr. Clark: No further questions.

Trial Examiner: Thank you very much. You are excused.

(Witness excused.)

Mr. Statham: I would like to make an observation in the record, because I think there may be some misunderstanding, and I don't want there to be any.

Trial Examiner: Were you through with the witness?

Mr. Statham: Yes. I want to be heard on—I want it to be clear on the record that in regard to Mr. Bethell's statement a while ago, that at the June 7th meeting, you know, what he said in regard to that being an illegal strike, that that was not stipulated to by the General Counsel. I merely—

Trial Examiner: It was an off-the-record discussion in an attempt to reach a stipulation. At this point, at least, it is not in the record. It is not a part of the record.

Mr. Statham: Yes, it is a part of the record.

[198] Trial Examiner: Excuse me. The final stipulation is in the record?

Mr. Clark: On the rehiring, that's right.

Mr. Statham: Mr. Bethell made it off the record, and then he put it on the record, too.

Trial Examiner: At the present time it is not a part of the official record. It was stated off the record, and not stated on the record.

Mr. Statham: Well, it is my recollection that I asked him for his position on the record, and he stated his position. I would like to state that—

Colloquy of Trial Examiner and Counsel

Trial Examiner: Well, so that no one should be misled, I make no findings of fact on a statement off the record and not on the record. Now, if it is important, and the statement is made on the stand, under oath, I can make a finding on it, but I cannot make a finding on statements made off the record, or discussions leading up to—

Mr. Statham: But if a position of the other side is asked for on the record, and when the other attorneys speak up and state the Company's position, that, of course, is binding, is it not, on the person making the statement?

Trial Examiner: If it is on the record, it is part of the Company's official position, yes, and would be binding on the company, if that statement is made on the record.

At this time, we will recess until 9:00 a.m. tomorrow [199] morning, and I understand that arrangements have been made for the use of this same courtroom, even though the Courthouse will not be open otherwise. We will adjourn until 9:00 a.m. tomorrow morning.

(Thereupon, at 5:50 o'clock p.m., the hearing was recessed until 9:00 o'clock a.m. of the following day.)

Colloquy of Trial Examiner and Counsel

[200] Chancery Courtroom,
Sebastian County Courthouse,
Fort Smith, Arkansas,
Thursday, February 22, 1962.

Pursuant to adjournment, the above-entitled matter came on for hearing at 9 o'clock a.m.

Before:

SYDNEY S. ASHER, *Trial Examiner*.

Appearances:

(As previously noted.)

[203] PROCEEDINGS

Trial Examiner: The hearing will come to order.

I want to express my appreciation to counsel and to the official reporter, all of you, for being willing to work on a legal holiday, and I think we should bear in mind that this is George Washington's birthday and all that that signifies for Americans. And with that, we will proceed with the business of the day.

Mr. Statham: By way of stipulation, counsel for the General Counsel offers into evidence a letter dated December 15, 1961, to Fort Smith Chair Company, from Louie Campbell, which has been marked as General Counsel's Exhibit No. 11. Inasmuch as I don't have the original letter, I am offering two copies. Will the Respondent so stipulate that these are admissible and authentic?

Mr. Clark: We will so stipulate.

Mr. Youngdahl: So stipulate.

Mr. Raphael: Yes.

Trial Examiner: Is there any objection to the receipt of the document?

Colloquy of Trial Examiner and Counsel

Mr. Clark: No objection.

Mr. Raphael: No.

Mr. Youngdahl: No objection.

Trial Examiner: In the absence of objections, General Counsel's Exhibit No. 11 is received in evidence.

[204] (Thereupon, the document heretofore marked General Counsel's Exhibit No. 11 for identification was received in evidence.)

Trial Examiner: Now, does the original not have any letterhead?

Mr. Statham: Could we read the letterhead into evidence?

Trial Examiner: We ought to do something because otherwise it appears to be a letter without a letterhead.

Mr. Statham: Could we do this—would you be willing to—

Mr. Ayers I will duplicate the original for you.

Mr. Statham: All right, and then we will substitute the duplicates for these carbon copies.

Trial Examiner: All right. That was signed—the original was signed by Mr. Louie Campbell?

Mr. Statham: Yes, sir, and the photostatic copy, of course, will bear the signature. That will be substituted.

Trial Examiner: Are you going to make the substitution now or later?

Mr. Statham: Mr. Ayers is going to make photostatic copies of the original, which he has, and then we are going to substitute them. He will do that at noon today.

Trial Examiner: That will be done at noon today, all right.

Mr. Statham: At this time, counsel for the General [205] Counsel rests his case in chief.

Trial Examiner: Does the charging party have any evidence to submit?

Mr. Youngdahl: Not at this time.

Edgar E. Bethell—for Respondent—Direct

Mr. Raphael: Not at this time.

Trial Examiner: Respondent?

Mr. Clark: Call Mr. Bethell.

EDGAR E. BETHELL, a witness called by and on behalf of the Respondent, having first been duly sworn, was examined and testified as follows:

Direct examination:

Trial Examiner: State your name and address.

The Witness: My name is Edgar E. Bethall. I live at 221 South X Street, in Fort Smith, Arkansas.

By Mr. Clark:

Q. Mr. Bethell, you are a practicing attorney in Fort Smith, Arkansas? A. Yes, sir.

Q. Do you represent Fort Smith Chair Company? A. Yes, sir.

Q. Did you represent Fort Smith Chair Company during the negotiations for the contract in question here, and also the strike that occurred? A. Yes, sir.

Q. Mr. Bethell, how long have you been a practicing attorney in this area? [206] A. I have been in the private practice since July 1, 1947.

Q. Prior to engaging in private practice, did you engage in teaching at the University of Arkansas or other places? A. Yes, sir.

Q. Would you relate your experience there, please, sir? A. I graduated from the University of Arkansas Law School in 1941, spent the following year on a fellowship at the University of Chicago Law School, teaching and doing graduate work, taught the better part of a year at the

Edgar E. Bethell—for Respondent—Direct

University of Arkansas before I went into the service. I was in the service three years. Upon leaving the service, I was employed by Judge John E. Miller, U. S. District Judge for the Western District of Arkansas as his law clerk for 18 months, and resigned July 1, 1947, to enter private practice of law in Fort Smith, Arkansas.

Q. Did you ever serve as a referee in bankruptcy? A. Yes, sir.

Mr. Statham: Mr. Examiner, I think he has laid enough background. I can't see the materiality of his past history.

Trial Examiner: Well, I will let it in.

By Mr. Clark:

Q. How long did you serve as referee in bankruptcy?

A. That was a part-time appointment, Mr. Clark, and I served from July 1, 1957, until—excuse me, from July 1, 1947, until 1954. I don't remember the exact date that I resigned, but [207] I believe it was in February of 1954.

Q. Have you served in any other appointments of a legal nature that you care to relate? A. I don't—

Mr. Statham: I object. I don't think that is material.

Trial Examiner: Well, I think he has indicated there weren't any, so the answer is no.

Mr. Clark: Have you any other objections?

Mr. Statham: After you ask a question, I might.

By Mr. Clark:

Q. Mr. Bethell, you are familiar with the original charge that was filed in this case. I will ask you whether or not

Edgar E. Bethell—for Respondent—Direct

the Regional Director, Mr. John A. Reynolds, refused to issue a complaint on the charge as originally—

Mr. Statham: Objection. I do have an objection to that question as being immaterial.

Mr. Clark: If your Honor please, we would like to bring out that related at the beginning of the trial, in my objection to the contract documents, that is, to the formal documents in this matter, that it did not include the entire history of this charge.

Trial Examiner: I will sustain the objection. I don't think the fact that the Regional Director might have refused to issue a complaint, and it was overruled by the General Counsel, is material. I suggest you put it in by way of offer of proof.

[208] Mr. Statham: I would like to point out it is wholly immaterial, and, in addition, the fact there was a supplemental investigation after—

Mr. Clark: You said that already, and the Trial Examiner has ruled.

Trial Examiner: Let counsel finish.

Mr. Statham: Well, since the objection has been sustained, I guess there is no need for any further objection, but I will add that whenever I have something to say, Mr. Clark, I do want to say it.

Mr. Clark: I have no objection.

Trial Examiner: Well, I sustained the objection.

By Mr. Clark:

Q. Mr. Bethell, this is an offer of proof. The Regional Director, did he not, refused to issue a complaint based on the charge as originally filed against Fort Smith Chair Company? A. Yes. I received a letter to that effect from Mr. Reynolds, yes, sir.

Edgar E. Bethell—for Respondent—Direct

Q. Now, you say you received a letter to that effect. Did you, as attorney for the Fort Smith Chair Company, receive a letter? A. Yes, sir.

Q. I hand you a copy of a letter dated July 19, addressed to Local 270, and also a courtesy copy to you as attorney for the Chair Company. Is this the letter you refer to? [209] A. Yes, sir.

Mr. Raphael: Is this on your offer of proof?

Mr. Clark: Yes, sir. If your Honor please, I would like to introduce this letter into evidence as part of my offer of proof. I believe that's No. 2.

Trial Examiner: This would be Respondent's Exhibit No. 3. The affidavit is No. 2.

(Thereupon, the above-described document was marked Respondent's Exhibit No. 3 for identification.)

By Mr. Clark:

Q. Now, Mr. Bethell, did you receive a letter addressed to the General Counsel in Washington, D. C., from Mr. Youngdahl as counsel for the Union, Local 270, in which he took exceptions to the ruling of the Regional Director and requested permission to file a brief in the matter before the General Counsel in Washington? A. Yes, sir.

Q. I hand you a copy of such a letter and ask you if that is the letter you refer to?

Mr. Raphael: This is still your offer of proof?

Mr. Clark: Yes. I'll tell you when I'm through.

Mr. Raphael: Thank you.

By Mr. Clark:

Q. Is this the letter? A. Yes, sir.

Edgar E. Bethell—for Respondent—Direct

Mr. Clark: I would like to introduce this in evidence, [210] please.

Trial Examiner: That will be marked Respondent's No. 4.

(Thereupon, the above-described document was marked Respondent's Exhibit No. 4 for identification.)

By Mr. Clark:

Q. Mr. Bethell, did you receive a copy of a letter addressed to Mr. Youngdahl as attorney for the Union from Irving M. Herman, Director, Office of Appeals, in Washington, D. C., National Labor Relations Board, in which the appeal was sustained, that is, the appeal by the Union was sustained and the Regional Director was directed to issue the complaint in this case? A. Yes, sir.

Q. I hand you a copy of that letter. Is that the letter you refer to? A. Yes, sir.

Mr. Clark: I would like to offer this into evidence.

Trial Examiner: No. 5.

(Thereupon, the document above-described as Respondent's Exhibit No. 5 was marked for identification.)

Mr. Raphael: Same objection.

Trial Examiner: This is part of the offer of proof.

Mr. Clark: That completes my offer of proof.

Trial Examiner: May I see the documents, please?

(Counsel hands documents to Trial Examiner.)

[211] Trial Examiner: The offer of proof is rejected in its entirety and the three documents,

Edgar E. Bethell—for Respondent—Direct

Respondent's 3, 4 and 5, will be rejected, and I will direct the Reporter to bind them in a separate binder of rejected exhibits.

By Mr. Clark (Continuing):

Q. Mr. Bethell, did you serve as the chief negotiator for the Fort Smith Chair Company during the negotiating sessions commencing on May 29th and lasting until the end of the contract? A. Yes, sir.

Q. I will ask you if, during these negotiating sessions, that you made notes as to what happened at each meeting?

Mr. Statham: Objection. Whether he made notes during these meetings is wholly immaterial.

Trial Examiner: Well, I will let him answer that. I am not ruling that notes are necessarily—I am not ruling as to what role they might play in the future, but I'll let him answer.

The Witness: Yes, sir.

By Mr. Clark:

Q. Do you have those notes with you? A. Yes, sir.

Q. May I see them? A. Yes, sir.

Q. Mr. Bethell, you have handed me some handwritten notes on legal-sized paper, tablet paper, made in ink. I see what appears to be some shorthand in there. Do you take shorthand?

[212] Mr. Statham: Objection. Now, I want to make an objection on the procedure we are following here. It is not proper for a witness to have documents in his hand, to hand it to the attorney, and then the attorney start identifying it. I don't think Mr. Bethell should have anything in his hand

Edgar E. Bethell—for Respondent—Direct

here. I don't think the attorney should be asking his client here what he has in his hand, and then taking it and identifying it. I think the proper procedure, if he wants to admit anything in evidence, is that the attorney gives it to the witness and asks the witness to identify it after it is marked as an exhibit. I am objecting.

Trial Examiner: Well, I am going to sustain the objection on the ground that I don't see that this lays a foundation for anything, any offer, and I can't see its materiality at this point. Now, it may be that we can later. I will sustain the objection.

By Mr. Clark:

Q. All right, I'll hand you back your notes, Mr. Bethell, and ask you are these the notes that you made during these negotiating sessions on May 29th and May 31st?

Mr. Statham: Objection. To begin with—

Mr. Clark: I'll ask to have it marked as an exhibit.

Trial Examiner: That will be Respondent's 6.

(Thereupon, the above-described document was marked Respondent's Exhibit No. 6 for identification.)

By Mr. Clark:

Q. I hand you back what has been marked [213] Respondent's Exhibit 6, and ask you if these are the notes that you made at the negotiation sessions on May 29th and May 31st? A. Yes, sir.

Mr. Clark: We offer Exhibit 6 in evidence.

Trial Examiner: Is there any objection?

Edgar E. Bethell—for Respondent—Direct

Mr. Raphael: We object, if the Examiner please, on the ground that there is no foundation, incompetent, irrelevant and immaterial.

Trial Examiner: Oh, I think the foundation is there, but I can't see the relevance of the notes. What is your purpose of offering them, Mr. Clark?

Mr. Clark: Mr. Bethell will be testifying from these notes from time to time and, as a matter of fact, he made very thorough notes as to what took place at both of these meetings, and to refresh his memory he will be testifying from these notes.

Trial Examiner: Well, when the time comes it has been established he needs to refresh his recollection, that is another matter. I am going to reject the exhibit. I am going to reject this document and direct that it be filed in a folder of rejected exhibits at this time. At the proper time you may re-offer, if you desire.

Mr. Statham: I don't think they should be given back to the witness.

[214] Trial Examiner: The document is now in the custody of the court reporter. It can be shown to the witness at appropriate times, when it is directed to be shown to him if it appears his memory needs refreshing, but for the moment it is now in the custody of the official reporter, and the attorney is free to pick them up and use them in his examination of the witness.

By Mr. Clark:

Q. Mr. Bethell, I am handing you back your notes here and if, at any time, you need them to refresh your memory, please refer to them.

Mr. Statham: I thought we had just had a ruling on that.

Edgar E. Bethell—for Respondent—Direct

Trial Examiner: I ruled they would stay in the custody of the Reporter. If Mr. Bethell asks to see them, then we will let him see them. But, for the moment, they should be in the custody of the Official Reporter.

By Mr. Clark:

Q. Mr. Bethell, this meeting that occurred on May 29, 1961, do you recall who was present at that negotiating session? A. Mr. Campbell—

Trial Examiner: Which day?

Mr. Clark: May 29th.

Trial Examiner: Thank you.

By Mr. Clark:

Q. Proceed, please. A. Mr. Campbell, Mr. Bost, Mr. LaRue, Mr. Cherry, Mr. Bearce, [215] and I believe there were four others whose names I was not acquainted with. I have since heard their names, but I didn't know them at the time.

Q. Who was present for the company? A. Mr. Ayers, Mr. Christy, Mr. Weeks, Mr. Martin, Mr. Condren and myself.

Q. Did the Union make what—it has been introduced as evidence that the Union made certain oral demands at that May 29th meeting. You are familiar with those, are you not? A. Yes, I wrote them down on my tablet as Mr. Campbell stated them.

Q. And also did the Company make any proposals at that May 29th meeting? A. Yes, sir, we offered about six proposals that were in writing.

Q. I believe those proposals have already been introduced in evidence. Now, did the Company respond to the

Edgar E. Bethell—for Respondent—Direct

Union's demands at this particular meeting, that is, May 29th? A. Yes, sir.

Q. Was that before or after lunch, do you recall? A. I believe the Company's response was given before lunch.

Q. What was that response? A. Well, as I remember, the first Union demand was that when a foreman was used to check the correctness of a standard that the employee whose job was affected by it, and [216] his steward, should be present to observe the test.

Q. Yes, sir. A. The Company's response to that was that most of these tests were run on Saturday or after working hours, that they would be entirely willing to have the employee and his steward there on their own time. However, if a test were run during working hours they would pay the people their base rate for the time that the foreman worked on the job running the test.

Q. All right, sir. A. I believe that the next proposal that the Union made was for—was that the foreman should be restricted to making one unit for purposes of experiment or development. The Company's response to that was that the request was unreasonable, that you couldn't experiment by making one unit; and with the grievance procedure in the contract, if the Company's conduct in using a foreman for production purposes went beyond what was permitted by the contract, that they had recourse through the grievance procedure and that, therefore, the Company didn't deem the change was necessary.

Q. How about the third one? A. Let's see. I may not be able to remember these, or repeat these, in the order that they gave them.

Q. Did it have something to do with time intervals before and [217] after holidays? A. Oh, yes. They had a proposal to amend the holiday clause. The existing contract provided that basically an employee had to be present at work the day before and the day after a holiday to qualify for holiday pay. Following that general statement,

Edgar E. Bethell—for Respondent—Direct

there were five exceptions in the contract providing that if the employee were sick or had been injured on the job and was at work within five days before and five days after the holiday we would still qualify him for holiday pay. Now, I believe they proposed to change one of those intervals of five days to eight and change the other to 20, and I don't think that I could tell you accurately which one was which, but the proposal was basically to change the outside limits in which the employee could be at work and still qualify for holiday pay. I believe the fifth exception to the general rule was that if the employee is absent due to a death in his immediate family he was excused. The immediate family was defined in the contract and the Union proposal was to expand that definition to include mother-in-law and father-in-law, brother-in-law and sister-in-law. The Company's response to that was that on the time intervals they felt the five days before and after was already adequate, that they couldn't ascertain that there had been any hardship on any employee in the past as a result of it. We asked the question "who's been damaged by it and mistreated or discriminated [218] against or got unfair treatment?" We couldn't get any cases and so we said, "Well, there appears to be no cause for that mother-in-law proposition." Not on the first response, but the second time we answered. Perhaps I am getting ahead of the sequence. We agreed that we would amend the phrase to include mother-in-law and father-in-law. We declined to agree on the brother-in-law and sister-in-law. I believe that was the second time we reviewed the proposal, however.

Trial Examiner: What do you mean by the second time you reviewed the proposal?

The Witness: That was after lunch, sir.

Trial Examiner: On the same day?

The Witness: Yes, sir. I believe I did get ahead of myself. I believe we reviewed this before lunch,

Edgar E. Bethell—for Respondent—Direct

and this concession was made by the Company in the review after lunch.

Trial Examiner: Thank you.

By Mr. Clark:

Q. How about the Union's proposal concerning these drop numbers? A. Yes, sir. The union had a proposal to change a provision in the stipulation. The provision was that on sample and pilot runs the Company would pay employees working on such items base rate plus 20% because inasmuch—because in such cases there was no incentive standard where there were samples, and usually where there were pilots. I think that added unless there is an incentive already set. Now, they wanted to [218A] add to that, to sample and pilot runs, drop numbers. They made the contention that the Company sometimes dropped a number out of the line and abandoned the standards, you might say, or it fell into disuse and subsequently the Company would get an order for that number and maybe would run one cutting of a drop number through the plant. They felt that if there were no standards available that they should get the base rate plus 20% on those. The Company's response to that proposal was that we had a proposal of our own dealing with that same subject. The Company's proposal was that the 20% be discontinued on sample and pilot runs and that sample and pilot runs, and consequently dropped numbers, should be paid at the base rate. The Company's reason for that was that employees were not working at an incentive pace on these items.

I believe the last Union proposal was that Section 5(a) of Article IV, dealing with seniority, be amended. That paragraph provided, in substance, that on temporary layoffs of one day or less the employee who formerly performs the work will continue to do it. The Union desired to

Edgar E. Bethell—for Respondent—Direct

amend that Article to make it read instead of one day, one day in any one week. This is the subject the Company and Union have debated back and forth for as long as I have represented the Company. The Union was always desiring to—

Mr. Statham: Mr. Bethell, just a moment. I think the [219] witness is getting a little far afield. I don't think he was asked about all this.

Trial Examiner: Are you moving to strike the answer?

Mr. Statham: Yes, sir, I think he should be limited to the question.

Trial Examiner: The answer is not responsive?

Mr. Statham: That's right.

Trial Examiner: Mr. Statham, only the attorney conducting the questioning can raise that kind of an objection, or rather can make that kind of a motion to strike on the ground of failure to respond. Will you continue, Mr. Bethell?

A. (Witness, continuing) Well, this provision—this proposal was not discussed at great length because it has been hashed and rehashed many, many times before, and the Union knew our position and we knew the Union's position. We so stated that we had been over this dozens of times. That was said in response to the Union's proposal, that we had been over this dozens of times and there was no use in our sitting there discussing it for an hour or hour and a half. They didn't try to drag it on and neither did we.

Q. Mr. Bethell, have you covered the Company's response to the various Union proposals and demands made that day? A. I have covered the response that was made before lunch, as I recall it, Mr. Clark.

Q. Was there any difference—was there any different [220] response made after lunch? A. Yes, sir. We went

Edgar E. Bethell—for Respondent—Direct

over them again after lunch and in more detail because we had had a chance to study them at greater length, and it was after lunch, which I stated a moment ago, that the Company agreed that they were willing to amend this holiday clause to include the mother-in-law and father-in-law.

Q. Yes, sir. A. I don't believe that, while we went into more detail and discussed it at greater length after lunch the various Union proposals, I don't know that there was any significant statement made by either side that I haven't already related. It was more an elaboration of what I have already said.

Q. Did the Union respond to the Company's proposals?

A. Yes, sir.

Q. Did they accept them or reject them? A. After lunch, on May 29, the Union responded to the Company's proposals and, without exception, denied them,—declined them.

Q. Now, did that terminate the meeting on May 29th? Was there any other discussion? A. No, sir. There was more discussion that day. We got into some discussion of the financial position of the Company and we also discussed, in dealing with the Company's proposals, I think the greater portion of the afternoon was spent in [221] endeavoring to explain to the Union the Company's proposals, or the principal ones at any rate, that is, the ones we deemed principal, in an effort to convince the Committee that the Company had merit in its proposals and what that merit was.

Q. Mr. Bethell, the Company's proposals have been introduced into evidence here. A. Yes.

Q. How many proposals were made by the Company on May 29th? Do you recall? A. I think it was six, but it could have been seven.

Q. All right. A. I am not certain, Mr. Clark.

Q. Could you, from memory, just give us a brief summary of the proposals made by the Company?

Edgar E. Bethell—for Respondent—Direct

Mr. Statham: I am going to object to that. They are in writing and herein evidence. It seems to me like this is immaterial.

Trial Examiner: Are they here in writing?

Mr. Clark: Yes, sir.

Trial Examiner: Sustain the objection. If you want to ask him what comments were made to the proposals, I will let you put that in; but where the written proposals are already in, I think the question is not proper.

By Mr. Clark:

Q. Let me ask you this way. Mr. Bethell, the Company made certain written proposals that have already been [222] introduced into evidence as General Counsel's Exhibit No. 6, and you have made the statement that these proposals were discussed at length with Union representatives. Was this done on May 29th, at the May 29th meeting? A. Yes, sir.

Q. Was there any particular—and I believe you stated, also, that they rejected these in their entirety? A. Yes, sir.

Q. Was there any particular proposal made by the Company that the Union objected to more vehemently than other proposals? A. Yes, sir.

Q. Which one was that? A. Well, there were—the scope of conversation, Mr. Clark, related to the obvious interest that the respective parties had in particular proposals we were pressing, basically three or four proposals there, and it was obvious to the Union that those were the ones we were most interested in and, consequently, the greatest discussion centered around those proposals, and I can tell you what those were.

Q. What were they? A. One of them was a proposal to amend the paragraph of the stipulation—let me digress

Edgar E. Bethell—for Respondent—Direct

just a moment to clarify one thing. When I refer to the stipulation, I am referring to a document that was entered into between the Company and the Union which governed the job evaluation and incentive system [223] that was originally adopted by the Company in 1957. The particular stipulation that was in effect and expiring at this time was slightly revised as of 1958; and when I say stipulation, I am talking about the entire document and not just some particular paragraph of it.

Q. All right, sir. A. The Company proposed to amend one paragraph of this stipulation to provide specifically that standards could be adjusted upward or downward; and further amended that paragraph to provide that there should be some prima facie showing of the fact that the employee or employees were unable to earn the contractually guaranteed bonus before a grievance would be sustained. That is not the exact language that was used. I am trying to recall from memory—before a grievance would be well founded.

There was another proposal in that same area that standards could be adjusted upward and downward and that employees had no vested right in any level of incentive earnings.

Q. Mr. Bethell, let me stop you. Have you finished? A. No. You asked me the ones that we primarily talked about.

Q. Yes, sir. A. The third one was a proposal, as the Company originally presented it, to amend the contract to state the obligation of an employee to notify the company when he was going to be [224] absent and to, at the same time, advise the company of his expected date of return, and included the statement that frequent absence would be grounds for discharge

The fourth proposal that the Company was pressing was to amend the grievance procedure. The entire proposal included switching from the designated referee in the contract to the use of the Mediation Service for selecting

Edgar E. Bethell—for Respondent—Direct

an arbitrator. and the requirement that a grievance be filed within ten days of the occurrence of the event unless it pertained to a revision of standards, in which case it was—in which case there was no limit. And the other change in that was to hold grievance meetings outside of working hours.

Now, those are the ones that the Company was urging acceptance of, either the proposal or some form of it.

Q. Mr. Bethell, I would like to get into this matter now. This vested rights and standards, that was an amendment to the stipulation? A. Yes, sir.

Q. Did that represent a change in the stipulation, as such, or was it—

Mr. Raphael: I object to that. That touches a critical matter and would call for a conclusion of the witness as to whether it would represent a change and, as I understand it, it runs to a vital issue here. I think whether or not it is a change depends on all the circumstances and the context in [225] which it was offered.

Mr. Clark: We think that the question is proper. Mr. Bethell was the chief negotiator. These proposals were made by the Company through him as their negotiator and attorney.

Trial Examiner: I am going to allow it is a proper question, and I think you can go into it thoroughly on cross-examination. Of course, I am taking it as the witness' opinion only and the weight to be given to it is another matter. But he has a background here of having represented the Company and I will let him answer the question. Answer the question, Mr. Bethell.

The Witness: We stated to the Union representatives at the meeting that it was not the purpose of the Company, in offering this proposal, to

Edgar E. Bethell—for Respondent—Direct

make any substantive change in the stipulation as it then existed.

Trial Examiner: That is the statement you made to the Union in that meeting?

The Witness: Yes, sir. I further stated to the Union Committee, not once but at least a half dozen or more time—

Mr. Statham: I would like to object. Now, I know you have already ruled, but I still think a witness necessarily is limited to what is asked him. I don't know how I can—

Trial Examiner: Now, that is a matter of discretion with [226] the attorney conducting the examination of the witness. That is a proper question and if he wants to let the answer in, it's all right. Certainly, there is nothing wrong in asking what was said in the negotiation meetings.

Mr. Clark: I wanted to find out what was said by the Company at these Union and Company negotiation meetings, and what was said about this vested interest matter. I want him to explain the Company's position regarding this vested interest matter and make any other comments the witness deems necessary in explaining the Company's position and relating it to the union.

Mr. Statham: I object. That question is a multiple question.

Trial Examiner: Well, it is multiple. Why don't you just ask him what was said?

Mr. Clark: Okay.

By Mr. Clark:

Q. What was said, Mr. Bethell? A. We said to the Union representatives not once, but a half-dozen times, that we had no—what was the word I used?—we were not

Edgar E. Bethell—for Respondent—Direct

wedded to the language that was written in this proposal. We told them that this proposal was brought about as a result of an arbitration opinion that had been handed down dealing with this problem in the stipulation; that, in our opinion, it was inconsistent with the fundamental purpose of the stipulation, of the incentive system, and with [227] what we had originally agreed upon, and that our purpose in offering this provision was to clarify what we had all understood for four years before this arbitration opinion was handed down; and that if this language that I had happened to select was offensive to them, that we were perfectly willing to receive any counter-proposal to make clear what we wanted to offer. We endeavored repeatedly to make clear to the Union that we had an objective, that is, to permit standards to be adjusted in accordance with the basic purpose of the incentive system. We pointed out to them that this arbitration opinion had held that an employee who was earning, let's say, 139%, and the standard was adjusted and it yielded 135%—and these figures are not the exact numbers, but something similar—the arbitrator said, "well, if the man had earned 139% in the past the new standard ought to be set to yield 139 in the future;" and that this was absolutely contra to the whole objective of the incentive system and that we just couldn't live with it. Mr. Ayers then told the Committee, he said—well, they asked him, they said, "John, are you getting ready to cut these rates? Are you going to cut these wages?" And John said, "I am not. I have no idea of cutting any one of them; I can't get a man to work at incentive effort if I reduce his incentive." And I pointed out to the Committee that the stipulation elsewhere spells out specifically the conditions under which a standard can be reviewed. It spells [228] out certain circumstances that permit a review, and that if one of those circumstances weren't present there couldn't be any review, but that all we were trying to get to was the proposition that when it is time to review a stand-

Edgar E. Bethell—for Respondent—Direct

ard, put in a new one, because of a change method, change material, or development of mechanical error, that the standards could be adjusted in accordance with the system that was in effect and there was no obligation on the Company to set it at an arbitrary point that would yield a bonus that the employee might have made on some other standard. Now, we went over that time and time again.

Q. You told this to them. A. Yes, sir.

Q. So then that represented more of a clarification of the existing contract than a change. Is that your statement?

A. That was what we told them and that was the way we felt about it.

Q. Brought about primarily by this decision of an arbitrator? A. That is right. I might add this, that we pointed out time and time again that this whole business was still subject to grievance and arbitration. As a matter of fact, really this business about no vested right in the particular level of incentive earnings itself, it said nothing about circumstances of adjusting the standards, and elsewhere in another proposal that we had on standards moving up and down the [229] proposal itself specifically states that any of these moves are subject to the grievance and arbitration procedure.

Q. And this was pointed out to the Union negotiators?

A. Yes, sir.

Q. Did this occur at the May 29th meeting and also the May 31st meeting, or both? A. Yes, sir, I suppose that there was more time in discussing this proposal than any other, by far.

Q. Now, Mr. Bethell, we have been primarily discussing what took place at the May 29th meeting, and you have stated that the Union did not accept any of the Company's proposals on that day. When did the next meeting occur?

A. The 31st.

Q. At the same place? A. Yes, sir.

Edgar E. Bethell—for Respondent—Direct

Q. Can you state essentially who was present for the Union? A. Same people.

Q. What about for the Company? A. Mr. Christy was not at the 31st meeting all the time. I believe he was late in arriving and I believe he left before the meeting was over. He was there during the middle of the day.

Q. And at this meeting on May 31st, did the Union agree to any of the Company's proposals which were made at the previous meeting? [230] A. Yes, sir.

Q. Which proposal? A. The—

Q. Or proposals? A. The first one upon which any agreement was reached was a proposal of the Company to modify a paragraph of the stipulation which outlined the mechanics of presenting a standard to an employee. The Company desired to change that paragraph to read that the presentation to the employee would consist of advising him of the standard time or number of pieces required to achieve standard. I believe it was Mr. Campbell who made the point that since he was responsible for the method in performing the work in accordance with the method, that that certainly should be explained to him, too, and we agreed with that. It was an obvious omission. It wasn't obvious to me, but it was an omission that, when called to our attention, was obvious, and so we agreed to making that change and it was written in on the Company's proposal. I wrote it in on mine and Mr. Campbell wrote it in on his. Those are in evidence here already. Besides writing in "Method to be Followed," Mr. Campbell also wrote on the bottom of it "O.K. by the Union." That was the first significant item of business that occurred on the morning of the 31st.

Q. Well, Mr. Campbell rejected the first part of that proposal giving as his reason that the Company already had the [231] right—

Edgar E. Bethell—for Respondent—Direct

Mr. Raphael: Object to the question as leading, suggestive, calling for a conclusion that Mr. Campbell rejected, and suggesting to the witness Mr. Campbell rejected it, et cetera.

Trial Examiner: I will sustain the objection.

By Mr. Clark:

Q. Your statement is then, sir, that the Union did agree to that proposal as modified?

Mr. Raphael: Objection. Let's have the conversation.

Trial Examiner: Sustained. Ask him what happened.

By Mr. Clark:

Q. What happened, Mr. Bethell? A. I told you on that proposal, Mr. Clark, there wasn't any prolonged discussion. Mr. Campbell pointed out the omission of showing the employee the method. We agreed to it, that that should be in. He wrote it in on his paper and I wrote it in on my paper, wrote it in John Ayers' sheet, and maybe the others, I don't know. I wasn't watching that. And Mr. Campbell said it was okay with that modification.

Q. Was there any mention at this time of the Union's failure to put its money demand on the table?

Mr. Raphael: Objection. That is leading and suggestive. May we have the conversations?

Trial Examiner: I'll sustain.

By Mr. Clark:

Q. What conversations, if any, took place at this time, Mr. Bethell, concerning money demands by the Union?

Edgar E. Bethell—for Respondent—Direct

[232] A. There was the remainder of the Company proposals discussed again, Mr. Clark, before we got to that. There wasn't anything of major substance said different from what I have related. We didn't just jump from this proposition to the money demands. It was on into the middle of the morning when we had been over the Company's and the Union's proposals again,—I mean by that, one time each on May 31st—when I said, "Mr. Campbell, now we are getting down and time is running out and you haven't made any money proposals yet. Don't you think it's time you put your money on the table?" And he said, "Yes," he thought it was about time. I believe before that, however, once again, as the date before, Mr. Ayers had suggested—Mr. Ayers had discussed the financial problems of this company in particular and the industry in general to some extent, and, if my memory serves me, it was after that that we suggested that they give us their money demands. They took a recess and stayed for a while and came back in, and Mr. Campbell prefaced his proposition by saying he was aware of the fact that the furniture business hadn't been too good and that the company had its problems, and he had a proposition to offer that he thought was going to be real attractive, and he made this offer of two cents per hour across the board, Christmas holiday, and otherwise the contract we discussed with the changes we had agreed upon.

Q. What were those changes you had agreed upon?

[233] A. Add the mother-in-law and father-in-law in the holiday specification clause and this little change in this stipulation about discussing new standards with employees.

Q. Did Mr. Ayers discuss at this time with the Union representatives the financial situation of the company?

A. Yes, sir, he went into it at great length at this time.

Q. What did he say? Do you remember? A. Well, he pointed out the increase in wages since 1957, I believe it

Edgar E. Bethell—for Respondent—Direct

was, if I remember correctly, of 47% increase in wages. He pointed out that although rates had not been increased in October that the employees had known—that the employees at least enjoyed a 5 cent per hour average increase in take-home pay between October, and I don't know whether it was the first of May—his most recent figures anyway—and he pointed out that the increase in the cost of living was far less than this, that the employees had enjoyed a real increase in wages. I believe he also pointed out that—it was either at this discussion or the next one, I'm not sure—I mean by that this would be the same day, but he went over this more than once. He pointed out that his percentage of labor and his total cost had gone up from 21% to 27%. He also pointed out that the Company had suffered substantial operating losses for the four previous years, four previous fiscal years, and that they were still considerably behind in the current fiscal year, and that there just had to be something [234] done to reverse the trend, that he had made what he deemed radical changes in the administrative end and selling end; and anything that he had control over he tried to cut the cost, but he still hadn't cut it back enough as they were still losing money and something else had to be done.

Q. Did the Union, after this expression by Mr. Ayers, continue to press its money demands? A. Well, Mr. Clark, let me see. I think that it was along about this time that we had the lunch recess. I could look at these notes. I indicated the recesses on my notes, and who brought up what, in what sequence. I think I can tell you everything that happened, but I might—

Q. Look at your notes and tell us whether, after Mr. Ayers' discussion of the economic conditions of the Company, you had lunch, or a recess was taken?

Mr. Statham: I object at this time. I think that his memory has to be exhausted on what occurred

Edgar E. Bethell—for Respondent—Direct

at all these meetings before he can start referring to his notes.

Trial Examiner: No, I think he indicated very clearly that he needed the notes to refresh his recollection. I think the ground work has been laid. I will overrule the objection.

Mr. Statham: Let me ask you this. It seems to me it is wholly immaterial as to whether or not one more wage demand was requested before lunch or not. It seems to me that this [235] is hardly a time that Mr. Bethell should start looking at his notes if he is going to testify to what occurred during the afternoon session. He hasn't testified that his memory is exhausted as to what occurred during that session.

Trial Examiner: Do you object to—

Mr. Statham: First, may I ask him a preliminary question?

Trial Examiner: Yes, sir.

Mr. Statham: Mr. Bethell, has your memory been exhausted as to what occurred on May 31st—the meeting on May 31st?

The Witness: Everything that occurred at that meeting?

Mr. Statham: Yes, sir.

The Witness: No, sir.

Mr. Statham: Do your notes include what occurred at the May 31st afternoon session as well as what occurred at the May 31st morning session?

The Witness: Yes, sir.

Mr. Statham: And isn't it true that this was one continuous meeting with the exception of a lunch break?

The Witness: Recesses, yes.

Mr. Statham: Yes, sir. I object to him starting to look at his notes at this time to what is wholly immaterial and irrelevant.

Edgar E. Bethell—for Respondent—Direct

Mr. Clark: I asked him to look at his notes to see whether or not the lunch hour occurred at this time.

Trial Examiner: Well, is that important?

[236] Mr. Clark: I don't think it's too important.

Trial Examiner: As long as the sequence is—

Mr. Clark: Yes, sir, I agree it is not too important.

Trial Examiner: And that is the pending question?

Mr. Clark: Yes, sir.

Trial Examiner: Well, I think, Mr. Clark, the witness has indicated he can't answer it without looking at his notes; and, if he looks briefly for that particular purpose, I can see nothing wrong, but I don't think it is too material one way or the other.

Mr. Statham: No, sir. The Respondent has admitted that. It seems to me the whole May 31st meeting should be gone through before he starts referring to his notes.

Trial Examiner: I will instruct the witness not to look elsewhere in his notes. I can see what your problem is.

The Witness: I think I can fairly well give the sequence of this without looking at them, but whether it was before lunch or before or after a particular recess, I'm not sure I could say, but I know what happened.

By Mr. Clark:

Q. Let me ask you this question, Mr. Bethell. After lunch on May 31st, did the Company again explain its economic condition to the Union?

Edgar E. Bethell—for Respondent—Direct

Mr. Statham: That question is leading, but I won't object.

A. Mr. Clark, I have to answer that the same way. When you [237] say did it occur before or after lunch, I don't know for sure. Like I said, I can tell you the sequence of the things that happened basically, I think, but when you put did it occur after or before lunch, I can't be certain of the answer on that. I can tell you what happened pretty well in sequence, I think.

Q. Well, would you care to refer to your notes to tell whether or not after lunch you—

Mr. Statham: We object to the witness looking at his notes.

Trial Examiner: Well, I am going to let him look at his notes briefly and instruct the witness to look only for that one thing.

Mr. Statham: Well, I think it is obvious he can't look at one thing without looking at something else.

Trial Examiner: Well, as soon as he finds it, I will instruct the witness to put the notes down.

Mr. Clark: Do you want to look over his shoulder?

Mr. Statham: I can't read his shorthand notes.

Trial Examiner: Mr. Bethell, you may look at your notes and as soon as you find the information here, please put the notes down.

Mr. Statham: It seems to me we have now a witness testifying from notes, because every time he asks him a question he reads his notes over to give his answer. He might [238] as well keep them in his hands and start reading them, as far as I am concerned.

Edgar E. Bethell—for Respondent—Direct

Trial Examiner: No, I instructed him to look for that one thing and when he has found it to put the notes aside.

(Witness examines notes.)

Trial Examiner: Now, having put your notes aside, can you answer the question?

The Witness: The Company's economic position was stated before and after lunch.

By Mr. Clark:

Q. All right, sir. And who stated it after lunch? A. Mr. Ayers, sir.

Q. All right. Now, did Mr. Campbell make any statement there about increase in wages, that is, after lunch, about the Union's position concerning an increase in wages?

A. Oh, yes.

Q. What did he say? A. We were talking back and forth all the time, and he said these people needed the money, that they had to live, and he pointed out the cost of groceries and cost of transportation, housing, rent, that they needed the money. He thought the Company could do it and still get along.

Q. Now, to the best of your memory, Mr. Bethell, after Mr. Campbell discussed the Union's position concerning the wage increase, was a recess taken? A. The two cents proposition was before lunch, and there [239] was a lengthy discussion after that, as we have said, about the Company's position. After lunch, the Company's position was reviewed again, both in relation to the contract demands—not all of them, but the ones that the thing had sifted down to—and there was a review of the conversation, particularly with reference to the proposed change in the stipulation. Now, I want to make clear that in this discussion there were two different proposals that were being discussed in this context, and the only way I

Edgar E. Bethell—for Respondent—Direct

can adequately identify them is to look at that exhibit of the Company's proposals and identify them specifically because—

Q. That is General Counsel's Exhibit 6? A. Yes, sir, because they are close enough together—because if I try—because if I were to describe them they could be misunderstood by somebody reading. One of them is the proposal which, at the bottom of the left hand corner, bears the legend "Exhibit 14". That is not an exhibit in this case, but that is a means of identifying it in the General Counsel's exhibit. It is identified "Stipulation", Page D-1. This was the Company's proposal which specifically introduced the proposition, this sentence—"The Company may initiate a review of standards on its own motion." And then the idea that "there must be a prima facie showing that the standard denies a normal employee a reasonable opportunity to * * *" and so forth. Now, those two items were the parts that [240] were amendments of the existing paragraph, and that was being discussed—

Mr. Raphael: You mean the existing paragraph in the stipulation?

The Witness: Yes, sir. That was being discussed in relation to the second proposal, which appears on the sheet that is identified as Exhibits 10 and 11 at the bottom left-hand corner of the page, still part of the General Counsel's Exhibit No. 6. That says "Stipulation Page 4. B-2 (Add the following) Standards may be increased or decreased as a result of re-study. No employee has a vested right in any level of incentive earnings." Now, this one I just read, and the one I read as bearing the identification of Exhibit 13, were being discussed together. They are related and complimentary proposals. And in the course of this discussion, after lunch on May 31st, when we were reviewing the

Edgar E. Bethell—for Respondent—Direct

Company's position, we were discussing this proposed change that the Company could review standards on its own motion. Mr. Campbell said the Company already had that privilege in the stipulation now, speaking of as it then existed, and so we said, "Well, if we understand each other clearly on that," and we thought so, too, and told him so, and that we had offered this solely for clarification so there wouldn't be a misunderstanding. He said he understood it that way all right, and so we said if that was the case we were willing to drop that part of the [241] proposal, and did so. He was unwilling to agree to this last portion of the change—"there must be a prima facie showing that the standard denies a normal employee a reasonable opportunity * * *" and so forth. He never did agree to that. But he kept talking about it and that was what was being discussed that afternoon in relation and, at the same time, with this other one about standards may be increased or decreased as a result of re-study and no employee has a vested right in any level of incentive earnings. And that was gone over some more. Mr. Ayers also stated in this session, as I recall,—and Mr. Campbell, of course, was pressing for his two cents, or for something to take back to the people to sell the contract, and Mr. Ayers told him that they ought to be coming in here asking for a wage cut. They had what we referred to as an eight cent adder in existence, and Mr. Ayers said "we ought to be getting rid of the eight cent adder," and there was a discussion at one point about abandoning the incentive system entirely, just junking it completely, and Mr. Ayers pointed out that he would be for that, that it had not accomplished its purpose, that is percentage of labor cost was up instead of

Edgar E. Bethell—for Respondent—Direct

down, as to what it was supposed to be as a result of the incentive system, that he had a lot of overhead in hiring an engineer and people to keep up with it and a time keeper, and so on, and that he would be glad to see it go. Well, nobody took that too seriously, I don't think. I don't [242] think the Union wanted to and I am sure—well, that's an opinion, excuse me. At any rate, that wasn't pursued at great length.

Q. What was Mr. Campbell's position as far as an increase in money is concerned? Did he take any position in relation to other changes in the contract? A. Yes, sir. Mr. Campbell, at one point, made the statement that "well, if there is not going to be any money, there's not going to be any other changes in the contract." And, of course—

Q. Well, do you recall about the time he made that statement whether or not there was a recess for the Union to consider these matters? A. Yes, sir. Well, I don't know whether it occurred right then, but not long after Mr. Campbell made that remark—I believe that statement was made before lunch, Mr. Clark, and we talked no more after that, and then after lunch the Company had reviewed its position on these proposals and reviewed the Union's proposals, and Mr. Ayers talked some more about the money and, at that point, the Union said they wanted a recess.

Q. Now, after the recess did Mr. Campbell come back and make any statement about what the Union's position was? A. Yes, sir.

Q. What did he say? [243] A. Mr. Campbell came back—

Trial Examiner: Just a minute. What was the question?

Edgar E. Bethell—for Respondent—Direct

Mr. Clark: If Mr. Campbell came back and made made any statement as to the Union's further position in these negotiations.

Trial Examiner: All right.

A. Yes, sir. After that recess—

Mr. Raphael: What time of day are you at now, Mr. Bethell?

The Witness: After lunch, but I couldn't say the hour, Mr. Raphael.

Mr. Raphael: I'm sorry—go ahead.

A. He came back in and opened the discussion with words substantially to this effect—"Now, does this Company want a contract, or does it want a strike?" And we assured Mr. Campbell that the strike was the last thing we wanted, that we were most anxious to get a contract, that we were losing money and we sure didn't need a strike to help us.

Q. Did Mr. Campbell then make any statement? A. Yes, sir.

Q. What? A. He said, "Well, we have talked over all that you have said, We have given it consideration and the Committee wants to get along with you and we got a proposition which we don't think you can turn down." And he made a further statement and elaborated on what a good deal he was getting ready to [244] offer and setting the stage for his proposal, and his proposal, in the final analysis, was "we are willing to drop our money demands if you are willing to drop your proposals, and we will extend the contract for one year with the changes we have already agreed upon."

Q. What were those changes? A. That was the mother-in-law and father-in-law amendment and the amendment of this paragraph in the stipulation about discussing the standards with an employee when it was changed.

Edgar E. Bethell—for Respondent—Direct

Q. At this point, do you know whether or not another recess was taken? A. Well, there was, of course, some more discussion of that proposal and very shortly after that the Company took a recess, I believe, to examine its position in the light of Mr. Campbell's new proposal, and after that recess we came back to the meeting and told the Committee that there were three propositions that we felt we needed, that we felt were essential.

Q. I will ask you what those propositions were. A. Well, in summary, we felt there should be some provision made with respect to our proposal of dealing with absences, that that was—

Mr. Statham: Excuse me one second. We have stipulated that and read it into evidence. Can't we save time—I mean [245] I just don't see—

Trial Examiner: Well, there are some written proposals in evidence, but I understand the witness is testifying to oral proposals, an entirely different matter.

Mr. Statham: Well, if you will recall, these afternoon proposals were read in evidence by stipulation a while ago and agreed—

Trial Examiner: They were written, weren't they?

Mr. Statham: Pardon?

Trial Examiner: Weren't they written?

Mr. Clark: Mr. Bethell is testifying to something different from what you are talking about right now.

Mr. Statham: He is talking about the proposals that the Company made after they returned from lunch—from the recess.

Trial Examiner: But those were written, weren't they?

Edgar E. Bethell—for Respondent—Direct

Mr. Statham: No, sir—but they were agreed upon by stipulation and read in evidence.

Trial Examiner: Well—

The Witness: No, sir, not what I am talking about.

Mr. Statham: Well, go ahead then. If there is some conflict here, why—

Trial Examiner: All right, go ahead.

A. (Witness, Continuing) At this point, the Company, after Mr. Campbell had made this proposition, took a recess, and then came back and told the Union that there were three [246] propositions that they felt were essential to having a contract. One was the provision to provide—one was the provision relating to absenteeism. The second was that there would be some provision dealing with this problem that was covered in our proposition that we identified as the vested rights provision, although, again, at this point, we emphasized to the Union that we were not sold on this language, that we had tried to revise it ourselves, and that we would be happy to consider any revision that they wanted to suggest, and all we wanted was a recognition of the principle. And the third proposition was the proposal—was a part of the proposal on a grievance change, and we, at that point, dropped all parts of the written proposal except the last paragraph, which is identified as Section 11, which is the grievance meetings being held outside of working hours. At this point we had dropped the changes that are contained in the remainder of that proposal as it appears in Exhibit 6.

Q. Let me ask you this. Did the Union accept any of these proposals? A. No, sir.

Q. What was said about them? A. Well, quite a bit. Mr. Campbell pointed out that they just couldn't go along at all with this grievance change, that that was very offensive to them, that their people, a lot of them, rode with people that worked at other plants, and that [247] he

Edgar E. Bethell—for Respondent—Direct

felt it would hamper them in presenting grievances because a lot of the people couldn't stay after working hours—couldn't or wouldn't. We discussed the fact that there had been quite a few disagreements in the past over the way the grievances were handled and protested, and that he thought that could be cleared up in the future, that they weren't going to have any more trouble with that, and that we ought to forget this proposition about having grievance meetings outside of company time, or outside of working hours, and that we had gotten along for quite a while and that we could get along in the future.

On the absence deal, he said that a lot of these people lived out in the hill country and didn't have telephones and didn't have good mail service and they couldn't notify the company when they were going to be absent. We pointed out that it would be a rare case when a person neither had access to a telephone nor could tell the person they were riding with that they were going to be absent and when they might come back, and that this was a substantial cost item to the Company, where it appeared to us that the Union could help considerably without any serious damage to the membership, and we thought that was just a matter of common sense and courtesy, and that whenever people were absent they should let the Company know as soon as they could. Now, after this discussion—as I said, Louie was pressing to get rid of these three proposals, [248] pressing hard for his proposals, and—

Mr. Raphael: I object to the characterization "pressing hard". Let him tell us what was said.

Trial Examiner: I will sustain the motion to strike. Just answer—just tell us what he said.

The Witness: All right.

A. (Witness, Continuing) At this point, he suggested that the Company take a recess and reconsider their position

Edgar E. Bethell—for Respondent—Direct

to see if we couldn't forget this stuff. So we took another recess.

Q. Did you also point out to Mr. Campbell and the Committee again that this vested rights was subject to grievance procedure?

Mr. Raphael: Objection, very leading question and very suggestive.

Trial Examiner: I will sustain the objection.

By Mr. Clark:

Q. Go ahead and state what happened after the recess.

A. Well, the Company took another recess at this point to examine its position again in the light of these comments. We came back and amended the proposition that had just been discussed, and the proposition that we offered the Union at that point was that we would revise our proposal on the absentee business to where it would say nothing more than that an employee should notify the company when he is going to be absent as soon as practical, and let the Company know [249] when he might be expected to return to work, pointing out that this was not mandatory, but it was advisory, that all potential penalties were deleted from the statement, and that we desired to have this sentence be in a statement of the employees' obligations or responsibilities for the purpose of having foreman and superintendents to be able to show it to an employee and say, "look, the contract says you should let us know." I omitted to say in this context, in this discussion earlier on this point, we had pointed out that some employees deemed that the provision in the contract that they lose their seniority after three days of unreported absence, they thought it was a license to be absent for three days, and we had a lot of trouble with them who would call in the afternoon of the third day.

Edgar E. Bethell—for Respondent—Direct

Mr. Statham: Objection. This is wholly immaterial.

Trial Examiner: He said that it was said at the meeting. It is what went on at the meeting, and I will overrule the objection.

Mr. Stratham: I beg your pardon. I didn't understand.

A. (Witness, Continuing) That was a discussion that we had with Mr. Campbell, and we pointed it out to the Committee as a whole, pointing out our reasons for wanting these proposals.

Mr. Raphael: I would like to understand was this, what you have been talking about was said at the meeting, was this Mr. Ayers talking, or you, or somebody else?

[250] The Witness: Mr. Raphael, I would hesitate to say on this point.

Mr. Raphael: All right.

The Witness: I would hesitate to say whether I said it or Mr. Ayers said it. We were giving the reasons for the company's request for these proposals, one of us, and we said we felt that the people seemed to feel that they had a license to wait until the third day and then call in and say, "Well, I'm absent," and then expect all is forgiven and forgotten, and that they felt they were doing everything that they had any duty to do, and we said that we needed this change to put a stop to that practice, which was an expensive one from the Company's standpoint and no gain to the Union that we could see, or to the people. So, as I said, we amended that proposal and cut it down to a statement that they should call us.

Edgar E. Bethell—for Respondent—Direct

On the grievance procedure change, we agreed to withdraw our proposal—that the meetings would be held outside of company hours.

Q. Mr. Bethell, I assume the Company had experienced some difficulty in this grievance procedure in the past?

Mr. Raphael: I object—suggestive and leading.
Trial Examiner: Sustained.

By Mr. Clark:

Q. What was the Company's experience in the past as far as grievances? [251] A. Well, the Company had stated to the Union, in the course of this discussion over the table, that they felt that grievances were being pursued that had very little, if any, merit, and that an excessive amount of time was being taken both from the employees and from company personnel to handle grievances and that it was an expense item of considerable consequence to the company in terms of amount of time that it was being lost in the grievance procedure.

Q. Go ahead and state what was said about the Company's proposal in this regard here? A. You mean on the grievance procedure?

Q. No. You were about to state the Company's position before in relation to the reporting proposal and now on what happened regarding the grievance procedure. A. Well, at this point, when we came back in from the recess, in addition to changing the absence clause, we withdrew our proposal to hold a grievance meeting outside of working hours and substituted for it a statement that the shop steward committee should consist of not more than three employees who would be allowed not in excess of one hour a week during working hours and should receive their base pay, their base rate, for the time spent. In offering this

Edgar E. Bethell—for Respondent—Direct

proposal, we made clear to the Union that the three committeemen referred to here did not exclude the grievance being presented, if the committee so desired it, during working hours and the [252] attendance of such witnesses as the committee might feel was necessary to get the information about the grievance. It was further stated that, at that time, while we proposed to limit the time to one hour during working hours in a week that this was not a limitation on the amount of time that could be spent in grievance meetings, that if they wanted to meet after working hours in addition to this that they would be at liberty to do so and the company would meet with them just as long as they wanted to stay there and talk.

Q. Was there any request made at this time by the Union pertaining to putting these proposals in writing?

A. These—

Mr. Statham: Again this is a leading question.

Mr. Clark: Now, if Your Honor please—

Trial Examiner: I will sustain the objection.

That was leading.

Mr. Clark: What's the harm done if I just—

Trial Examiner: No—no.

Mr. Clark: I was just trying to save a little time.

Trial Examiner: No, Mr. Clark. I think we will save time if you stop asking leading questions.

By Mr. Clark:

Q. What happened after that, Mr. Bethell? A. Well, the revised Company proposals were discussed, and this third proposal, the one about no vested rights in any [253] incentive earnings, we emphasized again that that context, that we still weren't wedded to this language and that we were willing to use any language which suited them so long as it obtained the objective that we discussed pre-

Edgar E. Bethell—for Respondent—Direct

viously. Louie talked to John at some length then trying to get him to get off these proposals and forget them and accept his proposal.

Mr. Raphael: Can you tell us what he said, Mr. Bethell?

The Witness: About the same thing as I have already related, Mr. Raphael. I will repeat it if you wish. He stated all the arguments that were made before and they are just repeated, but—well, one of the main arguments was that the people didn't understand changes in the contract, and that even if he might not object to them himself that any time you took a contract down to a meeting where there was a hundred and some odd people present and you told them that the company wanted to change this contract that they had been working under for a lot of years, that they didn't understand it, and that they were against change, that it was hard to sell a change, and that when there wasn't any money on the table it was just too difficult to go down there and try to talk them into changing some provisions of the contract that they had had in there for a lot of years. I would say that in relation to the absence, our last proposal on absence, and the one on changing the grievance procedure, [254] that at this stage and in the light of our final amended proposal that I have last talked about, these were, as I remember, his principal arguments he made. He may have made others, but on these last revisions his principal objection was that we couldn't expect him to go down there and sell a contract or proposal to these people that involved changes in the contract and no money to sell it with. Now, he was still strongly opposed to our proposition on the vested

Edgar E. Bethell—for Respondent—Direct

rights in any level of incentive earnings. He just flatly opposed that. It wasn't a matter of selling it. It was just a matter of he wasn't going to agree to it and wasn't going to recommend them agreeing to it. I don't think his position ever changed on that. But those were the arguments he presented at that time, and he said, "Now, we went along with you for this last seven months without any money and we are offering to go along with you for another year without any money, and that ought to be enough."

I think that would pretty well summarize his arguments, Mr. Raphael. I am sure that something else was said, but this was a year ago, or thereabout. So John told him that he felt like that he just had to have these changes, that the grievance deal and the change in the grievance procedure and the change in the absenteeism statement of principle were points where he felt like the Union could agree to a change that would help the Company save money at no cost to them in terms of [255] money—in terms of either money or principle, or anything else, and that this was an area that if they really wanted to help the Company get back in the black that this was the point where they could really do it without any corresponding loss to them, and he felt that they should, and could, go along with it. On this other one, there just never was a meeting of the minds as to what the Company—

Mr. Raphael: What one was that?

The Witness: This vested rights.

Mr. Statham: I object to the characterization of "meeting of the minds". It seems to me—

Trial Examiner: I will let it go in. Go ahead, Mr. Bethell.

Edgar E. Bethell—for Respondent—Direct

The Witness: Well, we were saying that we weren't changing the contract in substance, and they were arguing that we were wanting to cut rates, and that is why I say that we really were talking about different things. We were talking about the same subject, but we were far apart in our understanding of the purpose. I should say on that subject there just wasn't anything close to agreement. We felt like that the Union wasn't trying, or didn't understand our proposal, and they apparently felt like we were trying to put something over on them.

Q. What happened then, Mr. Bethell, after this discussion? A. Well, when it became apparent that the Company wasn't [256] likely to make any more changes in its position, and there were some other witnesses who said the time was getting late and the Union people wanted to notify the employees at the Chair Company before they got off, about 4:15 or 4:30. I don't exactly know what time, but we were getting into that part of the day, and Louie already said "if that is your best proposition, write it down," and so John did. As a matter of fact, I had written it first. I wrote it out in longhand on the back of one of these copies of the proposals that we were offering, and John took that and made two hand copies of it, and when it was written out there were six items, but actually there were three of them that I would say were never in controversy. It had to do more with the history of the thing, like a letter agreement outstanding that everybody had said when a new contract was written up we would put it in. There wasn't any argument about it, but really just the incorporation of an existing agreement into the final written document.

There was another agreement that the Company made —no, I'm wrong on that; it was an existing agreement. At any rate, John wrote down these proposals. Louie Campbell told him, "I don't—I can't sell them. I wouldn't

Edgar E. Bethell—for Respondent—Direct

recommend them to my people, and I don't believe they will accept them," and so John finished writing them and handed him one and kept one copy, and Louie said, "Now, you know if my people [257] won't accept this, we are going to start right back where we started and our offer is withdrawn." He said, "Yes, we understand that."

Mr. Raphael: Who said that?

The Witness: Louie.

By Mr. Clark:

Q. Louie Campbell? A. Yes, sir, and at that point the meeting adjourned.

Q. Did pickets show up at the plant thereafter and, if so, when? A. Mr. Clark, that wouldn't be within my first hand knowledge.

Q. When was the next meeting held between the Union Negotiating Committee and the Company? A. June 7th.

Q. Where did that take place? A. The Ward Hotel.

Q. Who was present for the Company and the Union, if you recall? A. Well, the same Union principles were there that I have named. Now, there were either three or four other people, as I said before, individuals whose names I did not know, and I don't know whether there were three more or four more at that meeting. I wouldn't say. There was Mr. Campbell, Mr. Bost and Mr. LaRue, Mr. Bearce and Mr. Cherry I know were there.

Q. Those gentlemen you knew and knew their names? [258] A. Yes, sir.

Q. Tell us what happened at that meeting, Mr. Bethell, with regard to any further negotiations that might have taken place? A. Well, when the meeting opened, I asked Louie if he had sent notices to the Conciliation Service.

Edgar E. Bethell—for Respondent—Direct

Mr. Raphael: Objection. I see no reason why that is material.

Trial Examiner: It is part of what happened in the meeting. I think it is quite material. I overrule your objection.

By Mr. Clark:

Q. Go ahead and continue, Mr. Bethell. A. I asked him the question had he sent the notices to the Conciliation Service and State Labor Department. He said that he had signed them and laid them on the desk and his secretary was supposed to have mailed them. Then I said, "Where did you send them?" He said he sent them to Little Rock. Then I asked Mr. Wheeler, "Didn't you tell me that Louie told you he had forgotten to send notices?" Mr. Wheeler said he didn't remember saying that, and I said "all right" and we talked some more about the notice, and I said, "Louie, did you mail them?" He said no, that he had his secretary mail them, and I asked him again where he had sent them, and he said maybe he sent them to St. Louis, and then he said, "I sent them wherever they were supposed to go." And I said, "Well, now, [259] Mr. Wheeler and Louie, before we go any further with this meeting, I want to state that we will proceed only with an express understanding that the Company reserves any right that it may have if these notices were not sent or received, and unless we can have an express understanding that there will be no contention of waiver of any rights we may have that we will not proceed further in this meeting," and so Mr. Campbell indicated that he understood that and we talked some more about the notices after that. I said, "Louie, did you send them in an envelope with the return address on them," and he said, yes, he did. I said, "well, have you ever gotten them back?" and he said no, he hadn't. He said "sometimes we have a lot of disturbance in the mail," and

Edgar E. Bethell—for Respondent—Direct

he just didn't know what happened to them if they weren't received. So I made reservations again of the Company's position and Mr. Wheeler asked me the question, he said, "Mr. Bethell, what is the Company's position in respect to these notices?: And I answered him, "Mr. Wheeler, I believe it will be the Company's position that if these notices were not sent that this was an illegal strike." He acknowledged receipt of my statement by nodding, and I don't believe there was any further discussion at that point from then on, and he said, "well, we better get on", and so then he called upon Louie to state the Union's position, or outline the current bargaining position, and Louie did that. He outlined [260] what proposals had been seriously discussed on both sides and what position the Union had taken and what position the Company had taken. He asked the Company's position and we stated that Louie had outlined it substantially correct. I think we maybe had a few minor modifications and we had some discussion of the reasons for the Company's position on these various—or the three proposals that were really the ones that were in controversy. So then Mr. Wheeler said, "Well, let's have a recess and I will talk to each of you separately," and he did that. We might have had one—we might have had two; I can't say for certain whether we had one or two recesses. One was quite long, I know, quite strung out.

After those recesses, whether it was one or two, the Union came back in and said—we were getting ready to discuss our position, of course, and I believe Louie said, "We want to get along with you and we don't want to keep the people out over this absence proposal, that the people should notify the Company when they are absent, and we wouldn't want them to be on strike over a proposition like that." I think he said "we ought to be able to work something out on this grievance procedure," but he just wouldn't go along in any shape, form or fashion with the Company's

Edgar E. Bethell—for Respondent—Direct

proposal to revise the stipulation to stating anything on this subject that we call, for shorthand purposes, vested rights in the level of incentive earnings. He did say in this meeting "you all [261] have said that you would consider revising the wording of that clause; why don't you write something else up and let us look at it and maybe water it down and we might be able to go along with something along that line." He did say that. And so we said, "well, we will see what we could do," and then the arrangements were made for a meeting at 1:00 o'clock the next day. Then, after that, Louie asked John Ayers about the vacation pay. There had been an agreement which appears in one of these General Counsel exhibits—it was evidenced by a letter—that if the parties were unable to reach an agreement at the expiration of that May 31st contract that the people would nonetheless be treated as though they were working for purposes of vacation. In other words, if they went out on strike, the strike time wouldn't count against their earned hours for vacation credit, and that had been agreed to back in October, and here we were in a strike, and had been on strike a week, and Louie was asking John if he was going to honor that agreement, and John told him he was going to do it. And then the meeting adjourned.

Mr. Clark: Could we have a recess now?

Trial Examiner: We will take five minutes.

(A short recess was taken.)

Trial Examiner: On the record.

By Mr. Clark:

Q. Mr. Bethell, Mr. Louie Campbell, on direct examination yesterday, made the statement that at the [262] negotiating session on May 31st Mr. John Ayers, after giving the Union the written proposals of the Company, told Mr. Campbell that these were the company's proposals,

Edgar E. Bethell—for Respondent—Direct

and take it or leave it. Was such a statement made? A. Not to my knowledge, Mr. Clark.

Trial Examiner: Mr. Clark, what date was that?

Mr. Clark: May 31st.

By Mr. Clark:

Q. Was such a statement made at any negotiating session? A. No, sir. After this discussion of these last revised proposals, Mr. Ayers said, "Mr. Campbell—Louis, you might just as well take this and let the people vote on it." Louie said he wasn't going to recommend them and wasn't going to approve them, and John said, "You will just have to take it to the people and let the people vote on it."

Q. The statement was also made by a witness yesterday that Mr. Ayers pounded the table in making such a statement. Did that occur? A. No, sir.

Q. Mr. Campbell also made the statement yesterday that the Union offered to take the old contract, with or without the changes agreed upon. Was such an offer made by the Union? A. No, sir.

Q. Would you explain that? A. The Union's proposal, when they came back, was "we are [263] willing to drop our money demands if you will drop your proposals; we will go along for one year with the changes agreed upon." There was never any suggestion by the Union or by the Company of abandoning the changes that had already been negotiated and agreed upon by the parties.

Q. Mr. Campbell also made the statement yesterday that he asked the Company to put in writing a proposition to take the old contract as is, with or without the changes agreed upon.

Edgar E. Bethell—for Respondent—Direct

Mr. Raphael: May I have that question read back?

Trial Examiner: Will the Reporter read the question?

(Question was read.)

Mr. Raphael: I submit, Mr. Examiner, that is an incorrect summarization and report of Mr. Campbell's testimony.

Trial Examiner: I think Mr. Campbell's testimony was that the Company could do whichever it wanted, that it could take the old contract as is, or could take the changes agreed upon. Isn't that—

Mr. Raphael: That is correct.

Mr. Clark: And that he asked the Company to make them a written proposal.

Trial Examiner: One or the other of those.

Mr. Clark: Yes.

Trial Examiner: Can you rephrase it?

Mr. Clark: Yes.

Mr. Raphael: All right.

Trial Examiner: I think I will sustain the objection. [264] Reframe the question.

By Mr. Clark:

Q. Mr. Bethell, Mr. Campbell made the statement yesterday that he had asked the Company to make them a proposal in writing to the effect that the Company would agree to take the old contract with or without the changes agreed upon, that he would take this back to the people. Was such a statement made by Mr. Campbell, to your memory? A. No, sir, he didn't request Mr. Ayers to reduce that proposal to writing. That was his proposal to extend the contract for a year with the changes agreed upon, but he never put that proposal in writing, nor did he ever request the Company to reduce it to writing. The only request that

Edgar E. Bethell—for Respondent—Direct

was made to reduce a proposal to writing was after it became apparent that Mr. Ayers wasn't going to recede any further, that the Company had made its best offer, and Louie said, "Well, put it in writing and I will take it and read it to them." Now, that was the proposal that he asked the Company to put in writing and the Company put it in writing, but there was no previous request to put that proposal, or any other Union proposal, in writing.

Q. Mr. Campbell also made the statement yesterday that he agreed to the absence proposal, that he agreed to this on May 29th. A. Yes.

Q. Is this correct? [265] A. No, sir. I believe Mr. Campbell's memory is faulty on that. In the first place, I don't think the Union Committee agreed to anything on May 29th, and the only concession that they ever made to the Company was on May 31st when they agreed to this minor modification in the discussion of standards provision. Through May 31st the Committee gave no indication of agreement to any form of the Company's proposal on absence, and, as I testified, on June 7th, near the close of that meeting, and after the Company had revised it to where just this stamp of "should", Mr. Campbell made the statement, in substance, "we wouldn't want to strike on a proposition like that." I took that to be a tacit specific answer, although—

Mr. Statham: Objection to what he took it to be.

Trial Examiner: I will strike that.

By Mr. Clark:

Q. Mr. Bethell, did the Union make any offer to continue to work after June 1st until the differences could be resolved? A. Not in my hearing.

Q. Concerning these notices, when did you first become aware that the notices might not have been sent to

Edgar E. Bethell—for Respondent—Cross

the Federal Mediator and the State Labor Board? A. On June 6th.

Q. Will you explain that? A. Yes, sir.

[266] Mr. Statham: If this is going to involve hearsay evidence, I am going to object, of course.

Trial Examiner: Well, obviously it has to involve hearsay. I will sustain the objection. I believe there is a stipulation that the notices were never sent.

Mr. Raphael: A stipulation that the notices were never received.

Trial Examiner: All right, I stand corrected.

By Mr. Clark:

Q. Mr. Bethell, in any of these negotiating sessions, was the statement ever made that the contract changes would be put into effect on June 1 regardless? A. No, sir.

Mr. Clark: I believe that's all.

Trial Examiner: Cross-examination.

Mr. Statham: Yes, sir.

Cross-examination by Mr. Statham:

Q. How long have you been the attorney for Fort Smith Chair Company, Mr. Bethell? A. Since approximately June of 1957. Let me clarify that, Mr. Statham, in this regard. At that time, I was employed by a group known as the Fort Smith Furniture Manufacturers Association, of which Fort Smith Chair Company was a member. I was not employed individually by those companies, but by the Association.

Q. Now, in regard to this change "no employee shall have a vested [267] right to any level of incentive earnings," there was quite a bit of—there was disagreement

Edgar E. Bethell—for Respondent—Cross

between the Union and the Company as to what that clause meant at the negotiations, wasn't there? A. Yes, sir.

Q. And isn't it true, also, that prior to the negotiations there was a dispute between the Company and the Union in regard to how or when, or under what conditions the incentive level of earnings of a particular employee could be changed? Isn't that true? A. Would you care to put a time on that, sir?

Q. No, I want to have you answer it yes or no, if you can. A. I'm sorry, will you repeat the question for me?

(Pending question was read.)

A. As the question is worded, I would have to answer it no.

Q. Then are you saying that there was no misunderstanding between the Union and the Company as to when the incentive levels of a particular employee, or under what conditions the incentive level of a particular employee could be changed? A. Under what conditions they could be changed, no, sir, I don't believe there was any disagreement on that. If you want to—

Q. Isn't it true, Mr. Bethell, that the very reason you insisted upon this invested clause—I mean this vested rights clause—is the fact that although you were contending that [268] that wouldn't change the contract, under the Company's contention, the Union's prior statement and conduct were inconsistent with the Company's idea? A. Yes, sir.

Q. And, as a matter of fact, you had an arbitration proceeding in October of 1960, in which the Company did not prevail on its ideas of what that provision meant, isn't that correct? A. I can't answer that yes or no.

Q. Well, don't answer it yes or no. Answer it. A. The arbitration opinion contained a result which was inconsistent with the Company's understanding of the incentive system. The point was not to our understanding when the

Edgar E. Bethell—for Respondent—Cross

case was arbitrated. The arbitration did not develop over, nor did it to our understanding in the course of the hearing involve, the issue of whether or not in revising a standard the Company was obligated to set it so that it would yield a past average. The arbitrator rendered a decision, the effect of which was to suggest that—

Q. This is your opinion whether it was suggested or ruled, but go ahead. A. Well, the inevitable effect of it then. He didn't hold this specifically, Mr. Statham.

Q. Go ahead. A. But the result inevitably encompassed the idea that the Company, in revising the standards, was obliged to so revise [269] it that the employee on the new standard could get the same yield that he got under the old standard before the revision.

Q. That is correct. A. Now, that was not litigated before the arbitrator.

Q. Well, the arbitrator made the decision, whether or not the thing was litigated, isn't that correct? A. Yes, sir. And I think I should, in all fairness, add that that was the first time that the Company had had any idea that any such deal as that was involved in the stipulation.

Q. And you thought it was the Company's contention, regardless of what the arbitrator said, and regardless of how the contract had been interpreted, that it had a right to change those incentives if it wanted to, and the Union—the conduct of the Union and the statements made by the Union were inconsistent with those ideas. Isn't that correct? A. After that arbitration case?

Q. Yes. A. Decision, I might say, yes, sir.

Q. Now, Mr. Bethell, after the strike—after the work stoppage—after the work stoppage commenced on June 1, 1961, did you, at any time, file an unfair labor practice charge with the National Labor Relations Board in regard to, or as a result of, the Union's conduct and the individual employees' conduct in engaging in that work stoppage?

Edgar E. Bethell—for Respondent—Cross

Mr. Clark: We object to that question as not gone into [270] on direct examination.

Trial Examiner: Will you read the question, please?

(Pending question was read.)

Trial Examiner: I believe that goes beyond direct.

Mr. Statham: Well, throughout the cross examination of our witnesses by the Respondent, we repeatedly made objections and you said you believed in a wide latitude of cross-examination.

Trial Examiner: That's right, I certainly do as far as materiality is concerned, but that doesn't give the other side the right to go completely outside of direct examination.

Mr. Statham: We are talking about the Company's entire conduct between May 29th and June 7th.

Trial Examiner: No, I am going to rule that was not covered by direct examination. If you want to make him your witness for that, go ahead and do it.

Mr. Statham: I don't think it is necessary for me to make him my witness, frankly.

Trial Examiner: That is my ruling. My ruling is that you can't ask him the question unless you make the witness—unless you make him your own witness.

Mr. Statham: I don't want to belabor the point, but Mr. Bethell has contended that he advised the Union that they may have been in an illegal work stoppage.

Trial Examiner: He so said—he so testified.

[271] Mr. Statham: Now, certainly, it seems to me, it is relevant as to what, if any, actions were

Edgar E. Bethell—for Respondent—Cross

taken by the Union—I mean by the Company—in regard to the illegal stoppage. This was brought out during direct examination.

Trial Examiner: Well, I think you have got a point there. Is this question related to that testimony?

Mr. Statham: Certainly.

Trial Examiner: I will reverse myself. I didn't see the connection before. I will reverse myself. Answer the question.

The Witness: The answer is no.

Trial Examiner: That makes me curious though. Assuming that the strike was unprotected, does it necessarily follow, in your theory, that it would sustain the charges against the Union?

Mr. Statham: If the—

Trial Examiner: Is it your theory that if it knew the strike was economic, this might sustain the charge?

Mr. Statham: Not in this particular situation, no, but I think in the case of J. C. Penny the Board's decision—a charge was filed and sustained, but the facts are not quite similar.

Trial Examiner: Cite that case to me somewhere along the line, will you?

Mr. Statham: Yes, sir.

[272] Trial Examiner: Go ahead.

By Mr. Statham (Continuing):

Q. Mr. Bethell, in Paragraph 13 of the Complaint in this case, it is alleged that the Respondent discharged the employees who participated in the work stoppage and refused to reinstate them because they engaged in concerted activities. It is true, is it not, that after the em-

Edgar E. Bethell—for Respondent—Cross

ployees began participating in the work stoppage, who did participate in the work stoppage, the Company has refused to reinstate those employees? Isn't that correct?

A. Not one hundred per cent, no, sir—reinstate, yes, yes, I would say so. It is not a fair question in that I would have to give more than a yes or no.

Q. You have a right to explain your answer. I am not trying to trick you. A. A number of the people who participated in the strike have been hired, but as new hires.

Trial Examiner: Those are the ones listed in Paragraph 7 of the second Answer?

The Witness: That was, I believe, a correct list at the time, yes, sir. There have been others since then.

By Mr. Statham:

Q. But, nevertheless, it is true that the Company is refusing to reinstate all employees who participated in that work stoppage? A. If you use the word "reinstate" in the sense of return to their former seniority, the answer would be yes. If you [273] are talking about employment, it would be no.

Q. Well, I mean restore them to their prior employment status. A. The Company, No. 1, was not requested to do so before December 15th, so it didn't refuse prior to that time, for there was no request. Since that time, when there was a request, the Company has not acceded to the request.

Q. And they are refusing to reinstate those employees? A. By inaction, I suppose, yes. I don't believe there has been any formal declaration of that position.

Mr. Statham: No further questions.

Edgar E. Bethell—for Respondent—Cross

By Mr. Raphael:

Q. Mr. Bethell, prior to the time you engaged upon negotiations with Union representatives in May, 1960, you had converences with Mr. Ayers, did you not? A. Yes, sir.

Q. And during those conference you did, I assume, review the Company's economic position? A. Yes, sir.

Q. And Mr. Ayers gave you and discussed with you all the information he had showing the nature of the Company's economic position and in relation to its competitors, is that correct?

Trial Examiner: Now, just a minute. Mr. Raphael, are you asking—the witness for information given to him by Mr. Ayers at a meeting in which nobody else but the two of them were present?

Mr. Raphael: Oh, sure, this part of cross-examination.

[274] Trial Examiner: I think that that is confidential attorney-client relationship, and I will inform Mr. Ayers, who is in the hearing room, that he has a right to stop his attorney from answering this question if he so desires. If he doesn't desire, the question itself is proper and the witness can answer.

Mr. Clark: We are going to object, Mr. Trial Examiner.

Trial Examiner: I beg your pardon?

Mr. Clark: We are going too object to the question.

Trial Examiner: I said Mr. Ayers had the right. It is a personal right and cannot be exercised by the attorney. Mr. Ayers, if you have any objection, you may state it. If not, Mr. Raphael has a right to an answer to the question.

Mr. Ayers: I would rather testify to that myself, sir. I object to him answering the question.

Edgar E. Bethell—for Respondent—Cross

Trial Examiner: All right. I will grant a plea of confidential information. I won't permit Mr. Bethell to answer.

Mr. Raphael: I might say I don't want to argue with the Examiner. May I say I didn't ask him about the content of the conversation regarding the subject matter. I merely asked him whether that subject matter was discussed.

Trial Examiner: Well, I think that is confidential and—

Mr. Raphael: Well, I didn't ask him what Mr. Ayers told him.

[275] Trial Examiner: But you asked the content of the discussion.

Mr. Raphael: And I respectfully except to the Examiner's ruling.

By Mr. Raphael:

Q. Mr. Bethell, did the Company claim that it was in a financial position at the time of the negotiations that prevented it from offering any wage increase to the employees? A. I would say, in substance, that is correct.

Q. Did you state, or Mr. Ayers state, to the Union negotiators that you needed relief because of the Company's straitened financial circumstances? A. In substance, yes.

Q. Didn't you say that on your direct? A. Yes, sir.

Q. "We have got to have relief", right? A. That's right.

Q. Isn't that so? A. I don't know that he used the words you used, but substantially, yes.

Q. Am I breaching any confidence between you and Mr. Ayers, between you and your client, in repeating what you said on direct examination, Mr. Bethell, because if I am

Edgar E. Bethell—for Respondent—Cross

I want you to say so and I will withdraw the question. A. I believe that was the ruling made by the Trial Examiner [276] and not by me.

Q. Well, you are a lawyer. You know whether I am breaching any confidences. Is there any secret about the fact that that company was claiming straitened financial circumstances? A. None whatever.

Q. Is it true or not that that fact was communicated to the Union negotiators? A. That is correct.

Q. Now, one of the reasons why you needed relief was because the incentive plan was costing that much money, isn't that true? A. That would be part of it.

Q. That was part of it, wasn't it, Mr. Bethell, and you so stated to the Union negotiators, did you not? A. Mr. Raphael, I would not say that that was singled out.

Q. I didn't ask you that. A. You did, in substance.

Q. I didn't ask you that in substance. So there's no question about that, let's have the question read. A. That will be fine.

Mr. Raphael: May I request permission to have the court reporter read that question?

Trial Examiner: All right, I will ask the reporter to read the question.

(Question was read.)

[277] *By Mr. Raphael:*

Q. Mr. Bethell, was it not stated by you or Mr. Ayers, or one of the Company representatives, in the course of these negotiations that a cause—one of the causes—of the Company's straitened financial circumstances was the operation of the incentive plan, the cost to the Company of operating the incentive plan? Isn't that one of the reasons why your client wanted, to use your words, relief? Yes or no? A. As you have asked it, no.

Edgar E. Bethell—for Respondent—Cross

Q. Is it true, Mr. Bethell, that under the incentive clause, to wit, the stipulation under the old contract, the Company found that the guarantee of the earnings was costing too much money and, therefore, it wanted to get relief from the clause? Correct or not? A. No, sir.

Q. Did you ever make such a statement to anybody? A. Not to my recollection.

Q. Is it true, Mr. Bethell, that the arbitration that we had before Father Brown involved that very question in terms at least of his decision, as you have just testified a few moments ago? A. Involved what question, Mr. Raphael?

Q. The question, to-wit, that under the stipulation as this company was living with it with this Union, the Company was obliged if it did change an element in the standards to preserve the earnings of the employee a vested interest in [278] the preservation during the life of the contract of the earnings of the incentive employee. Isn't that true? A. I believe that principle was involved in the decision handed down by the arbitrator.

Q. That's right, and Mr. Ayers objected to that decision very strenuously, did he not? A. Yes, sir.

Q. And one of the reasons why he objected to that decision was because it would, if preserved and applied, cost the Company too much money, correct? A. Yes, sir.

Q. And you protested in writing to Father Brown, did you not, on a number of occasions? A. Yes, sir.

Q. And you told me about it, did you not? A. Yes, sir.

Q. And you and I discussed that question, correct? A. To a slight degree, yes.

Q. And isn't it true, Mr. Bethell, that when you started the negotiations with this Company that one of the things that the Company had in mind was to get relief by changing that stipulation in respect to the incentive clause? Isn't that true? A. Yes, sir, one of our objectives was to change

Edgar E. Bethell—for Respondent—Cross

the stipulation in respect to it, the principle that Father Brown introduced [279] as a result of this arbitration award, yes, sir.

Q. All right. And isn't it true, Mr. Bethell, that the Company's proposal described heretofore in the various questions put to the witnesses, that there was to be no vested interest in standard or earnings, and that was the kind of technique that the Company was using to get the kind of relief that you needed under that old stipulation?

A. That was the request that the Company made for that purpose, yes, sir. Now—

Q. All right. A. Just a minute. I am entitled to qualify my answer, Mr. Raphael.

Q. Your counsel will—

Trial Examiner: Just a moment. Let him qualify his answer.

Q. All right, Mr. Bethell. A. Your questions, Mr. Raphael, are long and they involve a lot of things. You say the "relief" we wanted. The relief that we wanted was a clarification of the stipulation to eliminate this principle that we have spoken of, that a revised standard must yield a previously established level of incentive earnings. Now—

Q. Yes,— A. Just a moment. There was no—

Q. I was agreeing with you. [280] A. Yes, there was no contention at that hearing that the Company had in mind or in prospect and, on the contrary, Mr. Ayers repeatedly stated that he did not have in mind or in prospect any reduction in rates as they now existed, but that he felt that it was essential that this principle be clarified for future reference.

Q. And, I take it, what you mean is that for future reference Father Brown's decision in that arbitration we have been talking about would not be applied in interpreting

Edgar E. Bethell—for Respondent—Cross

the agreement, but, on the contrary, your interpretation of the agreement would be applied? A. That is correct.

Q. Is that correct? A. Yes, sir.

Q. Now, Mr. Bethell, referring to the fact that there were only two meetings, May 29th and May 31st, followed by the strike, and I will ask you this, you represent a number of companies here in Fort Smith, do you not? A. Yes, sir.

Q. About how many? A. Oh, I couldn't tell you off hand; quite a few.

Q. Quite a few. And in the course of negotiations over the past eight to ten years, as you know them, there has developed a tradition, a fixed—more than fixed habit—with regard to the negotiations between the United Furniture Workers of [281] America and the companies you represent? Is that true or not?

Mr. Clark: I object to that question.

Trial Examiner: I will sustain the objection.

Mr. Raphael: Well, now, I think it is significant,

Mr. Examiner, and I press it.

Trial Examiner: It is going too far afield.

Mr. Raphael: Oh, I think it is not fare afield at all.

Trial Examiner: What the tradition is in other companies who are not parties to this proceeding? I will adhere to my ruling.

Mr. Rapheal: Well, I'll get at it another way.

By Mr. Raphael:

Q. Is it true, Mr. Bethell, that in the negotiations in Fort Smith, as you know them, with the companies you represent, and have represented, and having in mind the negotiations with the United Furniture Workers who represent the employees in those companies, is it true that

Edgar E. Bethell—for Respondent—Cross

the Companies' final offers are generally made toward the terminal point of the contract?

Mr. Clark: Object to that question.

Trial Examiner: I will sustain the objection.

Mr. Raphael: I press it and take an exception.

By Mr. Raphael:

Q. Mr. Bethell, do you recall that in the course of negotiations last September and October on the Ballman-Cummings Company you and I had a discussion about the necessity of changing the procedure in the negotiations in [Pages 282-291 inclusive, inadvertently omitted in numbering.] [292] Fort Smith so that we could arrive at an earlier determination—

Mr. Clark: Object to that question.

Mr. Raphael: I haven't finished.

Trial Examiner: Sustained.

Mr. Raphael: I haven't finished it.

Trial Examiner: Oh, I'm sorry. I beg your pardon.

Mr. Statham: It does seem to me that the Charging Party and the General Counsel is being far more restricted in their cross-examination than what the Respondent was. I remember specifically several times in the Trial Examiner's rulings that the questions are immaterial, but this is cross-examination and—

Trial Examiner: Oh, yes, I said that. I said that on numerous occasions.

Mr. Statham: Yes, sir.

Trial Examiner: And I believe that, but that is not a license to go into anything and everything. In other words, you can ask immaterial questions in

Edgar E. Bethell—for Respondent—Cross

a round-about way in order to get a witness to repudiate something he testified to on direct.

Mr. Statham: Yes, sir, and that is what Mr. Raphael is trying to do. I don't know how it can be assumed he is not.

Trial Examiner: Are you leading up to something here that has to do with anything that the witness testified to on [293] direct?

Mr. Raphael: Mr. Examiner, I think, as a cross-examiner, you ought not to ask me to disclose my purpose in asking the question.

Trial Examiner: You are pressing your question. I will ask the witness to step out of the room, if that will help any.

Mr. Raphael: No, I don't demand that. I am just amazed at the severity of limitation. I can only say that I am shocked and amazed at the severity of limitation placed on the examination by counsel for the Union as contrasted with the wide and unrestricted latitude put on the Company.

Trial Examiner: Well, I don't want to appear that I am being too strict on cross-examination. I will reverse myself. You may ask all those questions. Go back over them and ask them again. I will give you the latitude.

By Mr. Raphael:

Q. Mr. Bethell, what percentage of incentive workers are within the complement of employees at this plant?

A. I wouldn't have that information, Mr. Raphael.

Q. Do you have any idea about that? A. No more than I would say the majority. Now, what that majority is, I do not know.

Edgar E. Bethell—for Respondent—Cross

Q. Were there a lot of incentive grievances presented under the old stipulation? A. There were a fair number of them. "A lot" is a vague term.

[294] Q. Your answer can only be responsive to my question and— A. Quite a few, yes.

Q. All right, quite a few. And was that a source of displeasure by the Company and something they wanted to get rid of? A. We would like to have seen it reduced to cases that appeared to have some merit, yes.

Q. You don't say, do you, Mr. Bethell, that you have a total recall about everything that everybody said at these two meetings? A. No, sir.

Q. As a matter of fact, you were busy in other negotiations and your mind and mentality was pretty well occupied with a large number of other matters, was it not? A. I don't recall I had any other negotiations going on at that time, Mr. Raphael. I made very detailed notes of what occurred at that meeting.

Q. You don't purport to say that you remember everything that you said, everything that Mr. Ayers said, and everything that Louie Campbell said? A. No, sir.

Q. And there could have been times or things said that you don't recall having been said? You wouldn't deny they were said, right? A. Well, I would have to have you tell me what you have [295] reference to. I am sure there were some comments made that I don't remember. Comments in terms of proposals, the substance of them, I think I remember, yes sir, accurately.

Q. How long did the meeting take place on the morning of May 29th? A. May 29th, my recollection is that it was scheduled to start around 9:30 and ended up getting started about 10:00 o'clock, Mr. Raphael. Then we ran until 12:00, or probably a few minute after.

Q. At the June 7th meeting, the Company still had not retreated from the vested rights clause, had it? A. No, sir.

Edgar E. Bethell—for Respondent—Cross

Q. Still talking—and still sticking to that one? A. With the principle, yes, sir.

Q. And that was something you needed in order to give the Company the kind of relief it was looking for? A. We felt that that proposition went to the heart and soul of the incentive system, yes.

Q. Now, I asked you, Mr. Bethell, off the record if you had a copy of—I withdraw that. Do you recall, Mr. Bethell, that we had a conversation during the Ballman-Cummings negotiations in September and October of last year? A. We had many conversations, Mr. Raphael.

Q. Do you remember a conversation in the course of the Ballman-Cummings negotiations at that time relative to the [296] need in Forth Smith for both sides to get together before the termination of the contract? A. Yes, sir.

Q. And we had a long discussion about the fact that in most of the companies, or practically all, everybody waited until the last minute before they got down to real brass tacks, waited until the terminal point of the contract. Do you remember that? A. That's right.

Q. And that has been going on here in Fort Smith on both sides, has it not, for—oh, many years? A. Mr. Raphael, I have only represented these companies since 1957. I am told that it went on before, and it certainly has gone on since, I would say, with rare exceptions, if any.

Q. All right. Now, during the course of the Ballman-Cummings negotiations, do you remember we had a discussion about the Fort Smith Chair Company? A. I am sure we did, yes, sir.

Q. There was a discussion about the Fort Smith Chair Company, do you remember that? A. Well, if you would care to remind me what we talked about—I am sure we talked about the Fort Smith Chair Company, yes, sir.

Q. I will remind you. Do you remember Mr. Ayers making a statement during that negotiation, during those negotiations, [297] and I wish I could be more specific as to time,

Edgar E. Bethell—for Respondent—Cross

Mr. Bethell, but it was either in the latter part of September or the early part of October of last year, at the Goldman Hotel, and you and I and Mr. Ayers and the Committee of the Ballman-Cummings people were present, and during the course of those discussions we were talking about the Fort Smith Chair Company's strike and we were talking about the incentive plan as it had been changed in the Fort Smith Chair Company after the strike, because the strike in October, 1961, had been going on since June. Do you remember that? A. No, sir.

Q. You don't recall that at all? A. Not any discussion with regard to any change that had been made in the Fort Smith Chair Company.

Q. In the incentive system? A. No, sir.

Q. Do you remember any discussion by Mr. Ayers to the effect that the foreman had been urging him for a long period of time at Fort Smith Chair Company to change its incentive plan, that now with the new employees in the Fort Smith Chair Company during the strike that the foreman had said to him over and over again "we like it this way with the new incentive system"? Do you remember his saying that? A. No, sir.

Q. Do you remember Mr. Ayers saying anything like that at that [298] meeting "we like it that way"? A. No, sir. I might state further that I don't recall Fort Smith Chair Company's business was at any time discussed in the presence of the Ballman-Cummings Committee.

Q. Well, Mr. Bethell, you say you don't recall its being discussed at all? A. That's true.

Q. So that if it wasn't discussed at all, according to your present memory, then it is a fact, is it not, that not only the Committee wasn't there, but nobody was there? Nobody heard something that wasn't said, whether the Committee or anybody? A. That is correct.

Q. Isn't it correct? A. Yes, and I have said that you and John and I had some discussions at the Goldman Hotel

Edgar E. Bethell—for Respondent—Cross

regarding Fort Smith Chair Company, but I have no recollection whatever of the statements that you have asked me about concerning what the Company was doing in relation to the incentive system since the strike.

Q. Do you recall, Mr. Bethell, what was the percentage by which, according to you and Mr. Ayers, Father Brown's decision in the arbitration case we are talking about should have been reduced to be fair, according to your interpretation of the incentive clause? I know that sounds complicated and perhaps I ought to rephrase it. Do you understand what I am saying? [299] A. I don't know. I am trying to—I will try to answer your question, Mr. Raphael, and if I don't you can stop me. I think, to answer that question, I will almost—

Q. Will you have to look at your papers? A. No. I can relate what the problem was if you permit me to do so. It will take just a moment though to do it. You have to—

Q. The percentage by which you figured Father Brown was wrong in that decision. A. We didn't figure he was wrong by any percentage, Mr. Raphael. We figured that he was wrong—

Q. In principle? A. In principle. That is, that the evidence showed beyond dispute that after the standard was revised that the employees were earning something in the neighborhood of 135% of their base rate. Contractually we would be obligated to set standards that would yield, on the average, for incentive earnings from 20 to 25% of the base rate. Prior to the change in the standard, the employees had achieved a level of earnings on the old standard of approximately 145%, let's say. That may not be precise, but it is close. It is in his decision. As I say, we had established, and it wasn't disputed, that the employees on the new standard were obtaining a yield of maybe 135% under Father Brown's decision.

Q. 138%. [300] A. And that we were attaining—

Q. Under that job? A. The new standard.

Edgar E. Bethell—for Respondent—Cross

Q. Yes. A. Well, the figures are relative in any event. We are in the neighborhood of them.

Q. We are close. A. Yes, sir. But the thing that Father Brown said was that it was not sufficient, that the standard as restudied yielded more than the Company had contractually obligated to pay its employees for incentive, but that the revised standard should be set to yield something equal to, or nearly equal to, the yield that they had attained under the old standard.

Q. And this was what you objected to? A. Yes, sir.

Q. Objected to by you and Mr. Ayers and all the corporation? A. Yes, sir, because the incentive system that this company used was commonly known as the M. T. M. or motion time method approach, and the system posed the idea that a job was evaluated and standard set to yield, on the average, 20 to 25% which means that some would make more than that, but that each time a standard was restudied that it would be restudied in the light of standard data, not in relation to what somebody had earned under some other process on some other method, but what the standard should be set at a level to yield what the [301] contract provided for on this standard with this method, with this material, and Father Brown's decision threw that principle out the window and went back to the principle of preservation of past average, which the Company—in other words, the plan was to get away from under the old incentive system.

Q. That's your story, at least? A. Yes, sir.

Q. Under the old contract, what were the provisions regarding grievances and the time spent in investigating them, and who was to pay for that time? A. The contract previously in effect simply said that, in substance, grievances would be considered by the Shop Stewards Committee, who would be allowed one hour with pay for the purpose of considering grievances. It didn't say how big the Shop Stewards Committee was, whether they could

Edgar E. Bethell—for Respondent—Cross

have an hour, a day, an hour of grievance, an hour a week, or an hour a month. It said one hour with pay for considering grievances and it didn't say pay at the base rate, at an average, or what. It didn't say what rate of pay specifically was to be paid.

Q. What was the practice with regard to paying for a grievance time under the contract? Was it an hour per grievance or as much time as it took, or what? A. At the bargaining sessions, Mr. Raphael, there was some disagreement about that. Since I don't write the pay checks, I really don't have any first hand knowledge.

[302] Q. All right.

Mr. Raphael: Will you pardon us for two seconds?

Mr. Clark: Let's take a five-minute recess, if you please.

Trial Examiner: Yes, we'll take a brief recess.

(Short recess was taken.)

Trial Examiner: The hearing will come to order.

There was an off-the-record discussion between Mr. Statham and myself, and I believe Mr. Statham wants to put it on the record.

Mr. Statham: At the commencement of the recess, requested by Mr. Clark, I observed Mr. Bethell, who was testifying on the stand and prior to the commencement of the recess, and his attorney, Mr. Clark, going to an ante-room in the courtroom, and Mr. Clark had a pad from which, I think, he had been asking, and at least taking notes during Mr. Bethell's testimony. I then made an objection to the Trial Examiner that inasmuch as Mr. Bethell was testifying that I didn't think it was proper for his attorney to discuss his testimony, particularly in light of the fact that Mr. Clark had already indicated that he had additional questions to ask of Mr. Bethell. Mr. Clark then participated in the discussion and indicated that

Edgar E. Bethell—for Respondent—Cross

he thought it was fair and proper for him to discuss the testimony of the witnesses during the recess. I pointed out to the Trial Examiner that it was proper to ask leading [303] questions of a witness, and I certainly don't see how an attorney could take a witness on the stand into an ante-room and discuss his testimony with him, particularly in light of the fact that that witness was still being cross examined. The Trial Examiner overruled my motion, and stated that he thought it was proper for the attorney, Mr. Clark, to discuss Mr. Bethell's testimony with him. I stated that— I believe the Trial Examiner suggested that I should make my objection on the record. I am now making my motion. I am objecting to what occurred during the recess and requesting the Trial Examiner to hereafter rule that while a witness is on the stand he should not, during any recess, while he is still testifying, discuss his testimony with his attorney, or the attorney who put him on the stand, and this should particularly be true while this witness is in the course of cross examination.

Mr. Clark: May I make a statement, also, please? I would like to state for the record that Mr. Statham's comments are noted and that while Mr. Bethell and I were in the ante-room that we discussed nothing that we had not previously discussed before, even prior to the commencement of this trial, as an attorney-client relationship. I don't think that any conversations we had in that respect would be prejudicial to counsel's position in any manner.

Trial Examiner: Now, I will make my ruling on the [304] record so that there should be no question about it, that I will decline to instruct any witness, regardless of which side he is on, or who he might be, not to confer with counsel during a recess. I will not give such instructions. I do not feel that I am

Edgar E. Bethell—for Respondent—Cross

required to give such instructions under any law text that I know of. I do not say it would be wrong for presiding officers to give such instructions. I think it probably is at their discretion, although, again, I am not too familiar with case law, but from the standpoint of any rules to operate under, I will decline to give such instructions to any witness whatsoever.

Mr. Raphael: May I proceed?

Trial Examiner: Yes.

By Mr. Raphael (Continuing):

Q. Mr. Bethell, the Ballman-Cummings Company is one of the parties to a contract with the United Furniture Workers, is it not? A. Yes, sir.

Q. And it was at or about May of 1961, was it not? A. Yes, sir.

Q. Mr. Ayers is a party financially interested in the Ballman-Cummings Company, is he not? A. He is an officer of the company.

Q. Is that the same Mr. Ayers who is an officer of the Fort Smith Chair Company? A. Yes, sir.

[305] Q. What office does he hold in the Chair Company? A. Secretary-Treasurer.

Q. And the Ballman-Cummings Company? A. Mr. Raphael, I think the same office, but I really don't know for sure.

Q. All right, I am not pressing you on that. The two contracts covering Ballman-Cummings and the Fort Smith Chair Company made with the United Furniture Workers of America, Local 270, contained the identical stipulation that we have been talking about throughout the hearing, did they not? A. Yes, sir.

Q. And under those two contracts, Father Brown of St. Louis University was designated at that time umpire, was he not? A. Yes, sir.

Edgar E. Bethell—for Respondent—Cross

Q. And he has been acting as such for how long, to your memory and knowledge? A. I wouldn't know, Mr. Raphael. He was the umpire in the contract when I commenced representing the Association.

Q. And he has been the umpire during the tenure of your employment as counsel of Fort Smith Chair Company and, in particular, the two I just mentioned? A. Yes, sir.

Q. All right. Now, I show you this document which you gave me during the recess, entitled "Company's Proposals," and ask you whether that—well, withdrawn. Referring to the same [306] document described in the withdrawn question, I will ask you whose handwriting is on that paper? A. Mr. Ayers.

Q. And was that the set of Company proposals presented to the Union at the May 31, 1961, meeting in the Ward Hotel? A. Yes, sir.

Q. And on what—and at what point in the course of the afternoon discussions on that day was it so presented? A. Right at the end. Just a minute—it was right at the end that these were written down, Mr. Raphael. The proposals had been discussed for two days.

Q. All right. A. I think our inquiry meant physically handed.

Q. Yes, sir. Thank you.

Mr. Raphael: May we have this marked?

Trial Examiner: Intervenor's No. 1.

(Thereupon, the document-above referred to was marked Intervenor's Exhibit No. 1 for identification.)

Mr. Raphael: Now I would like to offer it in evidence.

Trial Examiner: Is there—

The Witness: Mr. Raphael, that is incomplete as you hold it there. When it was handed to Mr. Camp-

Edgar E. Bethell—for Respondent—Cross

bell it had a typed copy. This is a copy—well, I wouldn't say that—well, it would be just like the one handed to him, but it was a carbon [307] copy of Section 11 and nothing more than—

Mr. Raphael: Yes, I am willing that that should go in, Mr. Bethell, on our Intervenor's Exhibit 1.

Trial Examiner: All right. Is there any objection to the receipt in evidence of Intervenor's Exhibit 1?

Mr. Clark: No objection.

Trial Examiner: In the absence of objections, Intervenor's Exhibit No. 1 is received in evidence.

(Thereupon, the document heretofore marked Intervenor's Exhibit No. 1 for identification was received in evidence.)

Trial Examiner: May I see the document, please?
(Counsel hands Examiner document.)

Trial Examiner: Wasn't this read?

Mr. Statham: Yes, it was.

Trial Examiner: Proceed.

By Mr. Raphael (continuing):

Q. Mr. Bethell, you regarded Father Brown's interpretation in that award as binding on the Fort Smith Chair Company, being issued under the same stipulation as covering that company, is that correct? A. Well, I considered it if the same question came up with the Chair Company that there wasn't any reason to think it was any different.

Q. It was regarded by you as a binding interpretation, was it not? [308] A. I would have argued vigorously that it wasn't, but I am afraid I would have lost it.

Q. Well, in any event, it was the possibility that it was a binding interpretation that caused you to take the action

Edgar E. Bethell—for Respondent—Cross

you did in formulating proposals for changes in the incentive plan, is that correct? A. That is correct.

Q. Now, Mr. Bethell, you made a decision about discharging these strikers at some point, did you not? A. No, sir. You mean me personally?

Q. Did you make a legal determination about whether or not they could be lawfully discharged? A. Yes, sir.

Q. When was that?

Mr. Clark: I object to any further questions along that line about legal determinations, if your Honor please.

Mr. Raphael: Well, I submit, Your Honor, the Company is claiming they had a right to discharge the strikers because they were engaged in what they purported to be an illegal strike. Now, somebody must have told Mr. Ayers—and I assume it was Mr. Bethell—and I want to interrogate him about that portion of their Answer.

Trial Examiner: I will let you question the witness about what he thought, but as to the communication with his client that, of course, is subject to the client's objection, and if [309] his client wants to raise an objection as to the confidential nature of the communication, why—

Mr. Raphael: Well, I will just limit it to the time, in lieu of your original ruling.

By Mr. Raphael:

Q. Do you recall, Mr. Bethell, when you came to a determination about the potential legal or illegal activity of the strikers in this case? A. Yes, sir.

Q. When was that? A. I would say it was about the middle of the morning of June the 8th.

Q. All right.

Edgar E. Bethell—for Respondent—Cross

Mr. Statham: I would like to make one argument here. I don't, in my opinion, think your ruling is correct on this attorney-client privilege here. I think obviously, by filing their Answer in this case and presenting the issues which they have presented, they waive any privilege in this particular case. They are litigants here and they have raised the very issue here that they discharged these employees because they purportedly were engaging in an illegal strike. As far as I can see, they can't actually assert this attorney-client privilege.

Trial Examiner: They haven't asserted it yet.

Mr. Statham: I think they have in regard to your own objection. I think you asked if they did and he said yes.

[310] Trial Examiner: They asserted it once some ten or 15 minutes ago, yes.

Mr. Statham: But they are not asserting it at this time, so I think they are waiving it here.

Trial Examiner: If they waive it, then they are not asserting it, that's true.

Mr. Statham: And they haven't raised it in response to that question, and I contend that they waive it, and they can't raise it here even if they want to because of the issue presented in this case.

Trial Examiner: If they attempt to raise it, then I will listen to arguments at that point. It is premature now. They haven't raised the question yet.

Mr. Statham: Mr. Raphael just asked the question, to which an objection was raised and you sustained the objection.

Trial Examiner: No, no, I didn't sustain any objection on that question. That was a perfectly proper question. He asked the attorney what time he arrived

Edgar E. Bethell—for Respondent—Cross

at a certain conclusion. Now you proceed to argue that if Mr. Ayers—

Mr. Statham: Well, I think there were two questions. I think Mr. Raphael asked him when he advised his client that this strike was unlawful.

Trial Examiner: And I overruled the objection, did I not, Mr. Raphael?

Mr. Raphael: I think so.

[311] Mr. Statham: He didn't get an answer. I'm sure of that.

Trial Examiner: I think your last question was what period of time he arrived at a conclusion in his own mind.

Mr. Raphael: Yes.

Trial Examiner: All right.

By Mr. Raphael:

Q. When did you arrive at the conclusion that this strike was, as you concluded, illegal? A. About the middle of the morning, on June 8th.

Q. Did you communicate with Mr. Ayers concerning that subject matter? A. Yes, sir.

Q. When? A. Well, I first communicated this question—it first came up on June 6th when I first became aware of the possibility that the notices hadn't been given.

Q. And that was brought to your attention how? A. By a call from Mr. Wheeler, the Mediator, who called me in reference to the affairs of another client of mine, and as the conversation wound up I said, "Well, I'm surprised you weren't talking to me about the Chair Company," and Mr. Wheeler said, "What about it?" And I said, "Well, the strike." He said, "I didn't even know they were having a contract negotiation" and I said, "You mean you don't have the notice?" And he said, "No, I don't. I said 'See if it went to St. Louis.'" He said, "Can we have a meeting tomorrow?"

Edgar E. Bethell—for Respondent—Cross

[312] Mr. Statham: Objection on the ground it is hearsay evidence, and I move it be stricken. It is not responsive to Mr. Raphael's question.

Trial Examiner: Will the Reporter please read the question?

(Question was read.)

Trial Examiner: I think it is responsive.

Mr. Statham: He asked how it was brought to his attention.

Trial Examiner: Are you moving to strike?

Mr. Clark: I think the question is well taken, Mr. Trial Examiner. They asked him how, and this is part of it.

Mr. Raphael: By how, I mean the following—it could be by telegram, by telephone—

Trial Examiner: Oh, well, I don't think because the witness said it was broader than that, that the answer should be stricken. I will deny the motion to strike.

Mr. Statham: I think it is hearsay testimony and should be stricken.

Trial Examiner: Well, obviously when you ask how he was informed, you are asking for hearsay.

Mr. Statham: I don't think you are.

Trial Examiner: How you first became aware of something? You have got to—you could become aware of it from your own senses, or you could become aware of it through somebody [313] else telling you.

Mr. Statham: That's right, and all the answer called for was that "Mr. Wheeler told me" and he doesn't have to get into a long conversation of things Mr. Wheeler told him.

Trial Examiner: I will deny the motion to strike.
Mr. Raphael: All right.

Edgar E. Bethell—for Respondent—Cross

Mr. Statham: Are you ruling then it is not hearsay evidence?

Trial Examiner: I thought the motion was on the—well, no, this is within the hearsay exceptions, namely, that where it's material to find out what caused a man to take certain action, or how he became informed of a certain set of events, that where that is material, then—

Mr. Statham: You are not ruling that this testimony has any probative value except that Mr. Bethell thought something?

Trial Examiner: That's right.

Mr. Statham: Right.

Trial Examiner: Oh, I am not taking it for the truth or falsity of it all. Oh, I see your problem. I wouldn't let it in for that. I wouldn't make a finding as to whether or not Mr. Wheeler got the notice or not, if that's what is bothering you. I didn't see at first what is bothering you. Now, I want a clear understanding—I want it clearly understood I am not taking it for that.

Mr. Raphael: All right, so there's no problem.

[314] Trial Examiner: I didn't see the problem at first. All right, proceed.

By Mr. Raphael (continuing):

Q. Mr. Bethell, shifting over to another subject matter, on your direct examination and directing your attention to the May 29th meeting at the Ward Hotel, and particularly to this subject matter, you were telling us on your direct examination that the Company respondent to the Union's proposals and you said you thought the Company responded before lunch. Now, is your memory clear on when that took place? A. The first response?

Edgar E. Bethell—for Respondent—Cross

Q. Yes. You were talking about the first response of the Company to the Union's proposals and you weren't sure.

A. I don't believe that is accurate, Mr. Raphael. I said the Company did respond to them before lunch, and we went over them again after lunch. The question I said I was uncertain about at that time was whether or not the concession on the mother-in-law and father-in-law clause was made the first time or second time we went over it, and then I clarified it and said it was made the second time, after lunch.

Q. And you didn't say on your direct examination that you believed that the Company's first response was before lunch? A. I said on direct that it was my recollection that the first response was before lunch. I think it was—I could go look at my notes and tell you for sure.

[315] Mr. Raphael: That's all.

Mr. Statham: Just a few questions.

By Mr. Statham:

Q. Mr. Bethell, did you or anyone on behalf of Fort Smith Chair Company appeal the Arbitration decision of Father Brown that we have been referring to in regard to his ruling on whether or not the level of incentive earnings could be changed? A. Yes, sir.

Q. You did appeal it? A. Yes, to him. We asked for a reconsideration.

Q. And that reconsideration was denied? A. Yes, sir.

Q. Did you appeal it to any other court or body? A. I don't believe we have any procedure in this state that provides for that.

Q. So, I take it, your answer is no? A. Yes, sir, the contract says that the decision of the arbitrator will be final and binding.

Edgar E. Bethell—for Respondent—Cross

Q. That is by mutual agreement with the Company and the Union? A. It is part of the contract, Mr. Statham.

Q. Yes. So the interpretation of the contract then becomes a binding meaning of the contract, isn't that true?

A. As an abstract question, that's true. In the context it should be said that Father Brown did not rule or discuss this [316] principle in his decision. I stated earlier it is his result that yielded the principle.

Q. There is no question about that? A. No, sir. He didn't discuss it and I will say that I think the stipulation means that you have got to do so and so, and we didn't argue.

Q. But there is no question about what he decided, regardless of your opinion, that there is no question but what he decided these incentive level of earnings of an employee couldn't be changed at that particular level? A. That isn't exactly what he decided, Mr. Statham. He simply directed the Company to reduce the standard and thereby increase the yield in a situation where the employee was already earning in excess of 25%. Now, it is not my recollection that he kicked it back up to the point precisely that the employee had been earning before, although I could be in error on that.

Q. That is just your opinion? A. No, it is my recollection.

Q. Your recollection of what he did, in your opinion?

A. Yes, sir.

Q. Isn't it true that on several occasions you have stated that under the employment situation, as it existed there at Fort Smith, and under the incentive levels, that these employees were making far more than what the Company intended [317] for them to make? A. No, that statement was never made.

Q. Didn't you state that some of these employees were making far in excess of the 25% above the—25% above base—that the Company had intended for the contract to allow? A. No, sir.

Q. You never stated that? A. No, sir.

Edgar E. Bethell—for Respondent—Cross

Q. Haven't you told me on at least two occasions—one occasion when Mr. Youngdahl was present—that some of these employees were making as much as 50 and 60%? A. No, sir. Some of them were making as much as a hundred per cent. I don't know what I told you, but that is a fact.

Q. But you told us the Company couldn't live with that situation, didn't you? A. Not with the fact that any given employee might have a standard that yielded, depending on how you look at a hundred or 200% base, we couldn't live with the principle that we had to preserve past averages.

Q. That's right. A. For that reason. Now, mind you, when we talk about a standard, a standard may cover just one small operation on one piece of a chair—one piece of one chair—and the fact that an employee may realize a yield of 200% on one little item that he may not be on ten months or a year, in and of [318] itself doesn't make a big difference. But if you introduce a principle into the contract that says if this man establishes an average of 200%, then in all future standards set for the work he is going to do you have got to set a standard that yields him 200%, then you have set up a situation that sooner or later is going to kill the incentive system that had been in before 1947.

Q. And, Mr. Bethell, if you changed this contract so that no longer is it the contract as was interpreted by the arbitrator, then the Company, in the long run, is going to save a lot of money. Isn't that true? A. Well, again, it is the arbitrator's interpretation. Are you saying that if the Company's approach to the incentive system is adopted, that the employees are, in the long run, going to make less than under the arbitrator's decision? If that is your question, the answer is yes.

Mr. Statham: No further questions.

*Edgar E. Bethell—for Respondent—Redirect**Redirect examination by Mr. Clark:*

Q. Mr. Bethell, was that why this matter of incentives was so important to the Company? A. Yes, sir.

Q. You have explained that? A. Well, I have partially.

Q. Why was it important as far as the Company was concerned? A. Prior to 1957, the Fort Smith Chair Company had a piece [319] work system. Well, to understand this thing in its full context, there is a need to be said that prior to 1957 the Fort Smith Chair Company had a piece work system in its upholstery department only. Part of this piece work system was a contractual provision that, in setting new or changed rates, they had to be set to enable the employee to realize the same average earnings that he had realized for his past vacation average. His past vacation average was established over a period of 90 days in the springtime. The experience of the Company was that during this 90-day period intensive effort would be put out by the employee to establish the highest possible earnings because that average established his vacation pay, his holiday pay, and the base for establishing an incentive standard in the future, or piece work rate is what they were then. Now, when the Company set a new piece work rate, there were occasions when the employees took the position "we can't possibly make our average at this rate; it has got to be raised." And sometimes the Company finally raised it, and sometimes it went to arbitration and was raised, but it was raised. And then the Company had the experience that the employee doesn't only earn his average, he earns maybe five or 10% above his average. Now, when you get back around to the vacation scene again, you have got these higher rates and so you set a new base, a new vacation average, and the experience was that every year the average went up and, [320] consequently, in the ensuing year you always were required to set standards aiming at a new higher goal. Now, that system continued over a

Edgar E. Bethell—for Respondent—Redirect

period of years until, of course, that piece work system had become prohibitive. The Company employed an engineering firm to come in and re-engineer the entire plant. One of the principal purposes was to get rid of this old piece work system for the very reasons I have described. They adopted one which was designed to avoid this very thing, or, pyramiding past averages. We thought the Union thoroughly understood it in 1957 when the new incentive system—

Mr. Statham: I object to what he thought the Union understood.

Trial Examiner: Well, I will strike that.

A. (Witness, Continuing) All right. The Company operated for the period of four years, from October of 1957 until Father Brown's opinion came out, and I don't remember, Mr. Statham and Mr. Raphael, just when it came out, but it was in the fall of 1960, when he reached a result in the arbitration that introduced the idea that the Company had an obligation to set new standards so that they would yield a past average. Now, this was the principle that the Company spent many thousands of dollars to get away from at the Fort Smith Chair Company. It would have resulted, in the opinion of the Company, in this constant pyramiding of average, until the [321] thing killed itself, and we told the Union this in our negotiations. My notes in the margin will show where I made notes to myself to be sure and present this argument to the Union, and I did present it, that they had, in effect, killed the goose that laid the egg, and this had happened at other plants. Somebody mentioned the Couch and Bedding Company, where they took a reduction of rates there, and that is the reason it was done. The system had been killed there and got out of hand, as Mr. Campbell testified.

Edgar E. Bethell—for Respondent—Redirect

Mr. Statham: I object to that.

The Witness: He did testify on the stand yesterday—

Trial Examiner: Are you moving to strike?

Mr. Statham: I don't like to interrupt, but I think what his notes say should be stricken. I think he said "my notes will show" and then he said something about "something getting out of hand". It seems to me that is strictly a matter of characterization of saying the Union said it had gotten out of hand.

Trial Examiner: Strike the contents of the notes, because the notes are the best evidence of that; and the second, I think the characterization—I think your point is well taken on that, and I will strike that, that is, the phrase "got out of hand".

A. (Witness, Continuing) If those words—if that language wasn't used, the equivalent was. I pointed out to the [322] Committee that the incentive rates were getting beyond what the Company could afford and had resulted in a decrease that they had recently agreed to at Fort Smith Couch and Bedding, and it had something to do with Border Queen going out of business at Fort Smith. These things I pointed out to the Committee.

Now, in negotiations Fort Smith Table Company, another company in this group, had had to get away from the piece work rate on account of this principle of past averages, and they were starting the same thing here, and the Company felt that it just had to stop it before it got started.

Now, that is the story on why the Company felt so strongly on the principle that was involved in this proposal.

Q. Mr. Bethell, did you see anybody else taking notes at these negotiations? A. I think—

Colloquy

Mr. Statham: I fail to see that is material.

Trial Examiner: I don't think it's immaterial. Is the answer in?

The witness: The answer is no, sir.

Mr. Clark: If your Honor please, I would like to offer Mr. Bethell's notes in evidence at this time, on the basis that such notes constitute past recollections recorded.

Mr. Raphael: There has been no foundation laid, and so I object; also it is incompetent, irrelevant and immaterial.

[323] Trial Examiner: Has it been given a number?

Mr. Clark: Yes, sir, Respondent's Exhibit 6.

Trial Examiner: That is the one I rejected before and said you could reoffer it?

Mr. Clark: Yes, sir.

Mr. Statham: Counsel for the General Counsel certainly objects to this purported document being a past memory recorded. He has testified as to what occurred. He hasn't testified he has no recollection of what occurred.

Trial Examiner: How about that, Mr. Clark?

Mr. Clark: Well—

Trial Examiner: You have said he has no present recollection.

Mr. Clark: But, at the same time, they have made objections to Mr. Bethell referring to his notes, such as just previous to this. Mr. Bethell testified that his records, or notes, would reflect on the margin that he discussed so and so with the Union. For that reason, we think it would be pertinent.

Mr. Statham: We think it's immaterial.

Mr. Clark: We think it is pertinent not only for past recollection, but as evidence to this—but as evidence in conjunction with this witness' testimony.

Mr. Raphael: Mr. Examiner, it is quite settled that no foundation has been laid for the introduction of this document. [324] If it is going in as past recorded recollection of the witness, then you have to show he has no recollection.

Colloquy

Then you have to describe the circumstances under which the document was made, and you have to ask a whole series of preliminary questions as to whether the witness believes they are accurate, and whether he believes they were accurate at the time he made them, and a whole series of foundation questions which are not in the record at this point, and this offer comes after the witness has been on the witness stand and testified from his recollection on the very subject matter in that document for over an hour and a half. So under what conceivable theory could such a document be admissible into evidence?

Trial Examiner: Mr. Bethell, is this Respondent's Exhibit 6, which has been identified previously, the notes you referred to when you said you even made a note in the margin to tell the Union something?

The Witness: Yes, sir.

Trial Examiner: On what page does that appear?

The Witness: Well, you probably can't read it because I marked it out there after I had taken care of it. I can read it because I know what it said.

Mr. Statham: I object to him reading it.

The Witness: I didn't say I was going to read it, Mr. Statham.

[325] Mr. Statham: You said you were going to.

Trial Examiner: Just a minute. I have a ruling to make. Do I understand then that after you made these notes you crossed them out after you had made the point to the Union—you scratched it out on your pad?

The Witness: That is right. We are talking now about this side note?

Trial Examiner: I think that the instrument shows it was pretty well obliterated.

Mr. Statham: I don't think the fact the notes are obliterated proves anything at all.

Trial Examiner: I might allow it as secondary evidence.

Colloquy

Mr. Statham: You mean—you are not surely considering placing that whole document in evidence?

Trial Examiner: I am considering—I am not considering putting the whole document in evidence. I don't think a foundation was properly laid. Mr. Clark, before you can put this in, you would have to show he has no present recollection, which, of course, is not the case; but I am interested in this further point, Mr. Clark, that I struck some of this oral testimony with regard to his notes on the ground that the notes were the best evidence, but now the witness has testified, and the exhibit shows, that it has been obliterated, and I think if we can stipulate that it has been obliterated, or else I will let the third page in to show that it was obliterated, [326] so Mr. Clark can show, if he wants to, what was on those notes by oral testimony, because they are not legible now.

Mr. Statham: May I ask some preliminary questions?

Trial Examiner: Yes, sir.

Mr. Statham: Did you show these obliterated notes to the Union?

The Witness: I didn't pass it over to them, Mr. Statham. The pad was lying on the table in front of them. We were sitting across the table 20 inches wide.

Mr. Statham: And these notes were made for your own use, and you didn't pass those notes around and you didn't make the statement that you had obliterated them?

The Witness: No, sir.

Mr. Statham: Well—

Trial Examiner: All right. I will again reject the exhibit. It has already been rejected, but my examination of the exhibit shows that the witness made certain notes to himself, as he so testified, to remind himself to make certain arguments to the Union, and then, after he made the arguments, he obliterated the notes. I want the record to show that my examination of the document shows that

Colloquy

they are pretty well obliterated and pretty difficult to read. Under those circumstances, I am going to rule that Mr. Clark may ask him, if it is material otherwise, to repeat what he said before about them and what was stricken on the ground that the document [327] was the best evidence, because I now see the document can't be read and, therefore, is not the best evidence.

Mr. Statham: Well, I would like to say the fact he obliterated something in his notes is wholly immaterial. Whether he did it or not is wholly self-serving and—

Trial Examiner: Well, I now hold it wasn't objectionable on the grounds for which I struck it out, namely, that the writing was the best evidence, because now the writing can't be read.

Mr. Statham: I would like to state that I think the fact that Mr. Bethell took notes at this meeting doesn't make the notes admissible in evidence.

Trial Examiner: No, I am rejecting the notes.

Mr. Statham: The obliterated part of the notes doesn't make any part of the notes admissible. The fact he testified he made the notes to bring something up with the Union, and then obliterated the notes after he made the comments, does not make the notes admissible. It doesn't make a portion of the notes admissible. If he wants to testify that he obliterated the notes after he made the comments, that's all right, but—

Trial Examiner: He has already testified to that.

Mr. Statham: Then that's all that is admissible in this hearing.

Trial Examiner: I have rejected the notes.

[328] Mr. Statham: You are telling Mr. Clark—I thought you were instructing Mr. Clark to ask some more questions about it.

Trial Examiner: I didn't instruct him.

Mr. Statham: You suggested.

Colloquy

Trial Examiner: I have rejected his exhibit, but I said the record should show that in my examination of the rejected exhibit it shows that there is an obliteration.

Mr. Statham: I object to putting in the record that the Trial Examiner has examined the rejected exhibit and his comment that something was obliterated in it.

Trial Examiner: All right, the record will show your objection to that statement. There is also testimony of the witness that he obliterated it.

Mr. Statham: I thought it was stricken out, but I apparently am in error.

The Witness: I would like to say I "doodled" over it. I wasn't trying to conceal it or anything, but I just sat there and doodled over it.

Mr. Clark: Note our exceptions, and that is all.

Trial Examiner: Have you finished your direct?

Mr. Clark: Yes.

Trial Examiner: I mean redirect.

Mr. Clark: Yes, sir.

Trial Examiner: Are there any further questions of this witness?

[329] Mr. Raphael: Subject to one thing, Mr. Examiner. May we go off the record?

Trial Examiner: Yes, off the record.

(Discussion off the record.)

Trial Examiner: On the record. The witness is not excused at this time, but at this time we will take a recess until 1:45.

(Thereupon, at 12:40 o'clock p.m. a recess was taken until 1:45 o'clock p.m. of the same day.)

[330] AFTERNOON SESSION

Trial Examiner: Are we ready to proceed? The hearing will come to order.

Edgar E. Bethell—for Respondent—Recross

Mr. Raphael: I wanted to make sure that I had an opportunity to read these two documents that I have asked counsel to bring.

Trial Examiner: Do you want more time?

Mr. Raphael: Yes, sir.

Mr. Statham: While he is doing that, I would like to substitute two legible copies of G. C. 11 for those previously introduced.

Trial Examiner: All right. Are you ready to proceed Mr. Raphael?

Mr. Raphael: Yes, sir.

Recross examination by Mr. Raphael:

Q. Mr. Bethell, I show you this—may we have this marked for identification as Intervenor's Exhibit No. 2?

Trial Examiner: All right, it will be marked.

(Thereupon, the document above-referred to was marked for identification as Intervenor's Exhibit No. 2.)

Mr. Raphael: We have more copies here.

By Mr. Raphael:

Q. Mr. Bethell, I show you this document marked Intervenor's Exhibit 2, and ask you what that is. [331]

A. That appears to be the Arbitration Award that was issued by Father Leo C. Brown, of which you questioned me briefly.

Q. All right. I show you the bottom of the last page and ask you to look at the signature thereon and ask you if you don't want to change your answer that it appears to be—to the answer that that is the Arbitrator's decision?

A. Yes. When you asked me the question I was in the process of turning the pages to see what it was.

Edgar E. Bethell—for Respondent—Recross

Q. All right. Now, following that, Mr. Bethell, the Company took exception to it, didn't they? A. Yes, sir.

Q. And they wrote a series of letters to Father Brown, the Arbitrator, protesting his ruling as they understood it, in no uncertain terms as to his interpretation of the incentive system and earnings that the employees, or the level of earnings that the employees, as he saw it, were entitled to? Is that correct? A. No, sir. I wrote a letter protesting.

Q. Is this the letter that you wrote (indicating)? I am showing the witness a letter under the stationery of Bethell & Pearce, dated January 21, 1961. The last sheet is not clipped to it, but if you have a stapler here— A. This is it, yes. This is the letter that I wrote to him asking him to reconsider the Award, yes, sir.

Q. And was another letter written by you on behalf of the [332] Company? A. Yes, urging that he give us an answer. Mr. Campbell had called me and told me that the employees at Ballman-Cummings who were affected by the grievance, and maybe others, were restive and wanted something done, and they were about to go on strike, or he was having a hard time keeping them from it, and so—

Q. In other words, the Company felt so strongly about this matter that they didn't comply with that award all the way from 1960—the date of the hearing, or the date of the award, September 30, 1960—all the way through April, 1961, and still hadn't complied. Isn't that so? A. Yes, sir, we were still trying to get an answer from Father Brown as to our request for reconsideration.

Q. Well, you knew, didn't you, Mr. Pearce, that you— A. Bethell.

Q. Excuse me. You knew, didn't you, Mr. Bethell, that your client had signed the contract saying the Award to be final and binding and still you didn't comply with the Award? You felt that strong about it, didn't you?

Edgar E. Bethell—for Respondent—Recross

A. When the Award became final and binding, we complied with it.

Q. Well, is it your contention that this piece of paper, Intervenor's Exhibit 2, was not an Award within the meaning of the instrument? [333] A. The Award, yes, but we had a right to request reconsideration of it, and we did.

Q. Just a moment: Is it your contention that this first piece of paper signed by Father Brown on September 30, 1960, was not an Award? Yes or no. A. Oh, yes, it is an Award.

Q. It was an Award. Did you in your contract—or did the Fort Smith Chair Company, in its contract with the Furniture Workers, agree that the Award made by Father Brown would be final and binding? A. No, sir, I believe we said the decision of the Arbitrator would be final and binding.

Q. I will correct my question then, as you have just done. Did you agree that the decision was final and binding? A. Yes, sir.

Q. All right. And finally, the thing got to the point where, because you didn't comply with that decision because of your desire to reconsider it, or have Father Brown reconsider it, that you got some communication from Louie Campbell that the people were getting restless, isn't that true? A. Yes, sir.

Q. And when was that? A. Well, you have the letter. It has the date on it.

Q. All right. I will show you the letter. Is this the letter that contains that information about the restlessness of the [334] people? A. No, sir.

Q. Which one is it? I will show you all of them. A. It is the other one you have, sir.

Q. The April letter? A. Yes, sir.

Mr. Raphael: Mr. Examiner, may we have that marked for identification?

Edgar E. Bethell—for Respondent—Recross

Trial Examiner: Intervenor's Exhibit 3.

(Thereupon, the document above-referred to as Intervenor's Exhibit No. 3 was marked for identification.)

By Mr. Raphael:

Q. All right, Mr. Bethell. A. This letter that you have been questioning me about is dated January 21, 1961, when I wrote and asked for reconsideration.

Q. Yes, sir, and the one dated April 14, 1961— A. That is the date on which I wrote Father Brown asking that he give me some answer to my request.

Mr. Raphael: May we have the letter dated April 14, 1961, marked for identification?

Trial Examiner: Intervenor's 4.

(Thereupon, the document above-referred to as Intervenor's Exhibit No. 4 was marked for identification.)

[335] The Witness: I think it should be stated, too, that you were here in December, in Fort Smith, in December of 1960, and this subject was on the agenda for discussion at that time. Father Brown was here too, and—

By Mr. Raphael:

Q. Yes, I remember that. A. And your plane reservations were such, and the hearing lasted to such length, and there was not time to discuss this matter when you were present in Fort Smith.

Q. All right.

Edgar E. Bethell—for Respondent—Recross

Mr. Raphael: Now, may this be marked Intervenor's Exhibit next in order, a letter from Father Brown, dated July 15, 1961, responsive to Mr. Bethell's many communications concerning that subject matter?

Trial Examiner: No. 5.

(Thereupon, the document above-referred to as Intervenor's Exhibit No. 5 was marked for identification.)

By Mr. Raphael:

Q. I show you the letter of Father Brown to you, Edgar E. Bethell, dated July 15, 1961, and ask you whether Father Brown didn't send you this letter, finally disposing of the matter and confirming his initial Award as contained in Exhibit 2? A. That is right, on July 15, 1961.

Q. So it is fair to say that you made a pretty persevering and persistent and intensive effort to get Father Brown to change [336] his mind, is that correct? A. You can characterize it any way you wish, Mr. Raphael. I wrote the letter that you have introduced in evidence, yes, sir. Don't you think that is a fair characterization? A. Well, that is yours.

Q. Well, wouldn't it be yours? A. We were anxious to have it reconsidered. We thought it was of tremendous importance, yes, sir.

Mr. Raphael: I will offer these documents in evidence.

Trial Examiner: Which ones?

Mr. Raphael: All of them, Exhibits 2 to 5, inclusive—Intervenor's Exhibit 2 to 5, inclusive.

Trial Examiner: Is there any objection to the receipt in evidence of Intervenor's Exhibits 2 through 5?

Edgar E. Bethell—for Respondent—Recross

Mr. Clark: No objection.

Mr. Youngdahl: No, sir.

Mr. Statham: No, sir. I don't quite see the purpose of their introduction, but if it is just to show the opinion of Mr. Bethell, or the fact that he wrote several letters trying to get this decision reversed, but if it is offered for any other purpose, I object.

Trial Examiner: To which ones?

Mr. Statham: As I understand it, these letters are self-serving statements.

Trial Examiner: Well, No. 2 is the Arbitration Award. Is [337] there any objection to that?

Mr. Statham: No, sir.

Trial Examiner: In the absence of objection by anyone, Intervenor's Exhibit 2, the Arbitration Award, is received in evidence.

(Thereupon, Intervenor's Exhibit No. 2 heretofore marked for identification, was received in evidence.)

Trial Examiner: No, Intervenor's Exhibit 3 seems to be a letter from Mr. Bethell to Father Brown. I presume that is four pages. It has come apart here.

Mr. Raphael: Yes, sir, there is a last page that belongs to that.

Trial Examiner: Dated January 31, 1961—or January 21, 1961.

Mr. Raphael: Yes.

Trial Examiner: Is that objected to?

Mr. Statham: Yes, sir.

Trial Examiner: All right, that is objected to. I will withhold my ruling for a moment. Now, Exhibit 4 is a letter dated April 14, 1961, to Father Brown by Mr. Bethell. Is that objected to?

Mr. Statham: Yes, sir.

Edgar E. Bethell—for Respondent—Recross

Trial Examiner: Now, Intervenor's Exhibit 5 is a letter from Father Brown addressed to Mr. Bethell, and dated July 15, [338] three pages. Is that objected to?

Mr. Statham: That is the letter from the Arbitrator?

Trial Examiner: It is signed by Father Brown.

Mr. Statham: No, sir, no objection to that.

Trial Examiner: No objection to that. In the absence of objection, Intervenor's Exhibit No. 5 is received in evidence.

(Thereupon, the document heretofore marked Intervenor's Exhibit No. 5 was received in evidence.)

Trial Examiner: Now, would you like to state your objections to Intervenor's Exhibit 3 and 4? We will treat them together because essentially the problem is the same.

Mr. Statham: Well, that's right. The only reason I hesitate not to object to them is that they are—the only reason that I hesitate to not—that I hesitate to allow them in evidence is that it seems to me there is a lot of self-serving evidence, or opinion evidence, on the part of Mr. Bethell here which I certainly don't concur with and don't want to be bound by. If the offer is only to introduce these in evidence for showing the intensity with which the Company was trying to get the interpretation of the contract changed, or the Company's opinion of what the contract meant, regardless of what the Arbitrator ruled, then I have no objection to it, but—

Mr. Raphael: That is the purpose essentially. I wanted to show the Company's course of conduct and the feeling and motivation and perspective as later developed around this issue [339] of the incentive earnings problem and, therefore, I don't

Edgar E. Bethell—for Respondent—Recross

offer these documents for the truth of what they contain, obviously. They are only their contentions.

Trial Examiner: All right. Are you satisfied?

Mr. Statham: Yes, sir.

Trial Examiner: Are you withdrawing your objections?

Mr. Statham: Yes, sir, if they are being received for the purposes for which Mr. Raphael has stated he is offering them, I withdraw my objection, yes, sir.

Trial Examiner: I will limit them to the purpose—

Mr. Clark: May I make a comment?

Trial Examiner: Yes, sir, certainly.

Mr. Clark: If it please the Trial Examiner, I think these documents are—these documents which were objected to by the General Counsel—should be admitted for all purposes, for this reason, that throughout the entire course of this hearing—maybe I'm putting the cart before the horse—but since the Intervenor has introduced these exhibits, of course they are his exhibits, and I restate my position that I think they should be introduced for all purposes, and I would be happy to lay my foundation in that respect with this witness, as far as these two objected exhibits are concerned. First of all, I would like—I think the Trial Examiner should rule whether or not he can properly object on the ground stated to the introduction of the entire exhibits.

[340] Trial Examiner: Yes, I think you have a right to object to the introduction of them under a limited offer.

Mr. Clark: Yes, sir.

Trial Examiner: I take it, then, that Mr. Raphael has limited the offer. Do you object to them being limited? If so, you can voice it.

Edgar E. Bethell—for Respondent—Recross

Mr. Clark: Yes, sir, I believe that they should go in for all purposes, since it has been made very clear throughout the course of this hearing that the Counsel for the General Counsel and the Charging Party have been endeavoring to put the Company in the position that, being the party that did not desire changes in the existing contract—

Trial Examiner: Well, it is just possible we are quibbling over something that—well, I take it nobody wants me to base any findings of fact on statements made in the letters such as, for example, that Mr. Raphael had to catch a plane?

Mr. Raphael: No.

Mr. Clark: Oh, no.

Trial Examiner: Just picking that out, nobody is asking me to make a finding of fact based on such statement as that in these two exhibits, I gather?

Mr. Clark: That is correct.

Mr. Raphael: That's right.

Trial Examiner: All parties, I think, agree to that. But they are material as to what efforts were made, what—

[341] Mr. Raphael: That's right, the Company's intensive effort. We are in agreement on that.

Mr. Clark: All right, we are in agreement. Now, then—

Trial Examiner: I don't care what form we take it, or how we do it formally, but I see that everybody agrees.

Mr. Clark: Do I understand the Trial Examiner, in this instance, is limiting the introduction to just what these documents show as to the intensity on the part of the Company as far as Father Brown's decision is concerned?

Trial Examiner: What else do you think?

Edgar E. Bethell—for Respondent—Recross

Mr. Clark: Certain arguments were advanced.

Trial Examiner: Oh, well, I think that these could be admissible to show that they advanced certain arguments, also.

Mr. Raphael: I think the arguments belong in the briefs. The rational behind their position to the arbitrator is not the significant thing, but the repetitive nature of that position in relation to the negotiations here.

Trial Examiner: Well, I am going to accept them in evidence for all purposes except for hearsay. I am certainly not going to accept them for hearsay.

(Thereupon, the documents heretofore marked Intervenor's Exhibits 3 & 4 for identification were received in evidence.)

By Mr. Raphael:

Q. Mr. Bethell, there wasn't anything in this stipulation, or the contract, between Local 270 and the [342] Fort Smith Chair Company that said you had the right to ask the Arbitrator to reconsider his Award, was there? A. No.

Q. So you weren't exercising your—you weren't writing these letters and making these contentions to Father Brown in pursuance of any contractual provision? A. That is a matter of opinion. I thought I was.

Q. Well, you just said— A. I think the record should show, too, that each time a letter was written that a copy was sent to you and to Mr. Campbell. This wasn't an ex parte or unilateral approach to the Arbitrator.

Q. Oh, well, I wasn't implying that, Mr. Bethell. You misunderstood the purport of my question. Seemingly, at least, I didn't mean to imply anything such as your volunteered statement suggests. No, we concede we got copies of those letters. There's no problem about that.

Edgar E. Belhell—for Respondent—Re-redirect

Mr. Raphael: That's all, Mr. Examiner.

Trial Examiner: Any further questions?

Mr. Clark: Just one or two.

Further Redirect Examination by Mr. Clark:

Q. Mr. Bethell, you negotiated contracts with this Local on a number of occasions, haven't you? A. Yes, sir.

Q. Has it been your past experience that they ever [343] voluntarily surrendered a concession made by the Company?

Mr. Raphael: I object to that.

The Witness: No, sir.

Mr. Raphael: I object to that.

The Witness: Excuse me.

Trial Examiner: Would you state your reasons for the objection?

Mr. Raphael: Yes, I would be glad to. If you disallow me to show what tradition or experience or habit or course of conduct is, I think—

Trial Examiner: That is what I reversed myself on.

Mr. Raphael: I think then you ought to disallow the Company in a similar fashion. My second objection—what the Union did not do in negotiations with other companies doesn't prove, or attempt to prove, what it did or did not do in connection with the negotiations with Company X, Y or Z, or the Fort Smith Chair Company. Therefore, the ground of that objection is that it is not logically probative of anything. The third objection is that it is too remote, in any event. The fourth objection is you are dealing with human behavior. What Union negotiators do in negotiations with Company X may or may not be what they do with Company Y. If we were talking

Edgar E. Belhell—for Respondent—Re-redirect

about an IBM machine and its behavior in connection with the machinery on day X and Y and it varied on day X, then it would make sense. We are talking about [344] human motivation and human behavior in collective bargaining negotiations with a variety of companies. I submit it is immaterial and not admissible.

Trial Examiner: I will sustain the objection. You may make an offer of proof if you want to.

Mr. Clark: If the witness had been allowed to answer the question, as chief arbitrator for this company, and also other companies, in dealing with Local 270, he would have stated that he has never known them to relinquish a concession made by the company concerning contractual terms.

Trial Examiner: Well, I will reject that part of the offer which deals with negotiations with other companies. I will permit the offer of proof insofar as it has to do with negotiations with this company as long as the witness has been associated with this company, which, I understand, goes back in time approximately four or five years ago. I will permit it to that extent.

Mr. Clark: All right, sir.

Trial Examiner: If you limit it, you may continue.

By Mr. Clark:

Q. Mr. Bethell, concerning negotiations of the contract which took place May 29th and May 31st, did the Union give up any concession made by the Company in asking for a contract? A. No, sir.

Mr. Clark: That's all.

Colloquy of Trial Examiner and Counsel

[345] Trial Examiner: Now, Mr. Bethell, if you know, at the time of these events, did the Company have a seniority policy?

The Witness: Which events do you have reference to? Do you mean—

Trial Examiner: Before the strike.

The Witness: Yes, sir,—oh, yes.

Trial Examiner: The time that some of the former strikers were reinstated—

Mr. Statham: I don't understand that question.

Trial Examiner: Well, maybe I should explain myself. There was some statement either by stipulation or statement of counsel as to the seniority rights of some people who were taken back later on.

Mr. Statham: But not reinstated.

Trial Examiner: Maybe I used the wrong word. Let's say who were rehired.

Mr. Statham: All right.

Mr. Raphael: That's right, rehired.

Trial Examiner: And the question was asked about the seniority status, and I want the record to show that there was a seniority system—or I want to show if there was a seniority system, if he knows.

The Witness: I am not sure of the answer to that.

Trial Examiner: All right, I will get that from someone [346] else. From your own knowledge of the events that occurred, do you know for a fact that these strikers, or at least a certain number of them, were actually discharged for engaging in a strike?

The Witness: Yes, sir.

Trial Examiner: Other than those who received the letter asking them whether they had engaged in it—I mean there were some who were not discharged right away?

Colloquy of Trial Examiner and Counsel

The Witness: That's right.

Trial Examiner: But there were others that were discharged forthwith for engaging in the strike?

The Witness: Those employees who were scheduled to report for work on June 1st, and who did not report for work on that date, were sent a letter which, as I remember—

Trial Examiner: Yes, that's an exhibit.

The Witness: Yes, and which said they were terminated. If they were not scheduled to report for work on that day, regardless of the reason, they were sent this other letter, which is the next exhibit in order, which said—

Trial Examiner: I think those are Exhibits 8 and 9, which are already in evidence.

The Witness: Yes.

Trial Examiner: But the question is was the letter followed up? That is what I am after.

The Witness: You mean were they actually—

[347] Mr. Statham: I object. I think they were clearly discharged by that letter.

Trial Examiner: All right, I withdraw the question.

Mr. Raphael: The Company admits in its Answer they were.

Mr. Statham: Right.

Trial Examiner: All right, I won't press it. I withdraw it. It may be repetitious. Now, I have got one question I am going to ask you here about the negotiations. At the close of the session of May 31st, what would you say was the major stumbling block for agreement between the parties, if there was any one?

The Witness: Well, there were three.

Trial Examiner: The major area of disagreement?

Colloquy of Trial Examiner and Counsel

The Witness: There were about three, sir. There was the vest rights clause, and the change in the Shop Committee and the grievance hearing procedure, and the request of the Company for statement on absence. Now—

Trial Examiner: The first of those, the vested rights clause, would you say the clause the Company was seeking was a clause which would have changed, or modified, the contract as it existed at that moment, May 31st?

Mr. Statham: Objection, unless that is asking for his opinion. As I understand it, you are asking for his opinion, is that right?

Trial Examiner: Yes, sir.

[348] Mr. Statham: Withdraw my objection.

Trial Examiner: I am just asking his opinion. If you object, I will withdraw it.

Mr. Statham: No, sir. I think the others have been allowed to testify to the same thing.

The Witness: My opinion was that the contract, as it was written, would not be changed in substance by the proposal. I would have to say that the contract, as it was interpreted by Father Brown—let me restate that—that our proposal would have modified the meaning of the contract as it was construed by Father Brown, yes, sir, but not as we had understood it when we negotiated and up until the time of arbitration.

Trial Examiner: As you understood it on May 31st?

The Witness: Well, of course, while we paid them, Mr. Asher, we never conceded Father Brown was right. We were bound to pay them because we had agreed we would be bound by his decision.

Trial Examiner: One question on that. I think the record may be clear, but I am not absolutely positive.

Colloquy of Trial Examiner and Counsel

The Witness: Excuse me, sir, I made a misstatement. I don't believe that, at this time, we had gotten a reconsideration by him, that is, the answer to our petition for reconsideration didn't arrive until July, come to think about it, so it was still—this was still hanging fire. In other words, [349] from the Company's standpoint, we didn't know what, in the final analysis, he could do at that time, at the moment he had said that.

Mr. Statham: Objection as to what he said unless he is talking about the document.

Trial Examiner: They are in evidence.

Mr. Statham: O.K.

Trial Examiner: I assume he is talking about Exhibit 5, the letter dated July 15, 1961.

Mr. Statham: O.K.

The Witness: So the status of the thing, as it stood on May 31st, was that we had his first decision which put a construction on the contract that we had never understood, and it was unacceptable to us. We had asked for a reconsideration. We had not, at that time, received his decision and, of course, we had no means of knowing what it would be.

Trial Examiner: Now, the decision, of course, was rendered in the case involving Ballman-Cummings Furniture Company and not involving the Respondent directly?

The Witness: The stipulation, Mr. Asher—it is in evidence—covered both companies and there was no distinction between them. That is not entirely accurate, but, for the present—

Trial Examiner: Well, I know it was treated by you and all parties as if it had been a decision rendered in the case [350] involving employees of this company.

Mr. Raphael: There's no question about that.

John Ayers—for Respondent—Direct

Trial Examiner: All right, but I just wanted to be sure—I wanted the record to be clear because the letter which is in evidence shows, on its face, it involves a different company, and I wanted the record to be straight, that all parties treated this as if it were an interpretation of the rights of the employees of this particular company.

Mr. Raphael: There's no question about that. That's always been so.

Trial Examiner: All right. I have no further questions of the witness, but, in view of my questions, do any of the attorneys have additional questions?

Mr. Clark: We have none.

Mr. Raphael: No questions.

Trial Examiner: Thank you, Mr. Bethell. You are excused.

(Witness excused.)

Trial Examiner: Call your next witness.

Mr. Clark: Mr. Ayers.

JOHN AYERS, a witness called by and on behalf of the Respondent, having first been duly sworn, was examined and testified as follows:

Direct examination:

Trial Examiner: State your name and address.

The Witness: John Ayers, 1608 South 25th, Fort Smith, [351] Arkansas.

By Mr. Clark:

Q. Mr. Ayers, what is your position with the Fort Smith Chair Company? A. Secretary-Treasurer.

John Ayers—for Respondent—Direct

Q. How long have you been the Secretary and Treasurer? A. Approximately five or six years.

Q. Have you ever held any other position with the Fort Smith Chair Company? A. Prior to being Secretary-Treasurer, I was merely Treasurer of the Company, and prior to that I was Vice-President for about two years.

Q. Were you present on May 29th at the Ward Hotel during the negotiation session between Local 270 and Fort Smith Chair Company? A. Yes, sir, I was.

Q. Were you present also on May 31st? A. Yes, sir.

Q. Can you state, to the best of your knowledge and memory, who was present there for the Union? A. Mr. Louie Campbell, Mr. Elmer Bost, Mr. Otis Gillam, D. C. Cherry, Clyde LaRue, Jimmy Kinnerson, Harry Stephens, Clyde Bearce.

Q. Who was there present for the Company? A. Besides myself, there was Mr. Ed Bethell, Mr. Charlie Christy, Mr. Bill Weeks, Mr. Gerald Martin, Mr. Tom Condren, [352] and I believe Mr. Gene Spearman was there for a while.

Q. Throughout all of these negotiation sessions, Mr. Ayers, did Mr. Bethell represent the Fort Smith Chair Company as their chief negotiator? A. Yes, he did.

Q. He is the attorney for the Fort Smith Chair Company? A. That is correct, sir.

Q. During all of these negotiating sessions, did Mr. Bethell make certain notes? A. Yes, sir.

Mr. Statham: I object to the question if he made notes, and move the answer be stricken.

Trial Examiner: On what ground, that it's immaterial?

Mr. Statham: I don't think whether Mr. Bethell made any notes or not is material in this case.

John Ayers—for Respondent—Direct

Trial Examiner: Oh, I think it could corroborate the testimony already given by Mr. Bethell.

Mr. Statham: That he took notes, but why is this material in this case? It corroborates the fact he took the notes, but his notes are not in evidence.

Trial Examiner: No, but I believe he used them once to refresh his recollection.

Mr. Statham: I think it was disallowed—oh, I beg your pardon, he did. I beg your pardon.

Trial Examiner: I will overrule the objection.

Answer [353] the question.

The Witness: Yes, he did.

By Mr. Clark:

Q. Have you seen these notes that he made?

Mr. Statham: Objection. Whether or not Mr. Ayers has seen these notes is immaterial.

Trial Examiner: Well, what is the materiality of that?

Mr. Clark: I just want to establish that Mr. Ayers, since he was present at all the meetings, he saw the notes that were made by Mr. Bethell, and I was going to have him identify Exhibit 6 as being the notes. That's all.

Mr. Statham: Objection. It is a rejected exhibit. I don't see what good it would do to have him identify it.

Trial Examiner: It was rejected not because it wasn't fully identified, Mr. Clark. It was rejected on the ground of immateriality and not on authenticity.

Mr. Raphael: I object on the ground it wouldn't prove, or attempt to prove, any fact in issue.

John Ayers—for Respondent—Direct

Trial Examiner: If it had been rejected for lack of proof of authenticity, I would allow it, but in my recollection it was rejected on the ground of immateriality and I sustained the objection.

By Mr. Clark:

Q. Your statement is that you did see Mr. Bethell take notes during all of these meetings?

Mr. Statham: Objection.

Trial Examiner: I will sustain the objection. That is [354] repetition. It is already in.

By Mr. Clark:

Q. Now, Mr. Ayers, on this May 29th meeting it has been testified to here that the Union made certain proposals orally, and that the Company made certain counter-written proposals, and they are in evidence. Do you recall such proposals being made by both sides? A. Yes, sir, I do.

Q. Now, what, in the way of a money proposal, did the Union make on May 29th, if any? A. I don't believe that the Union made a money proposal on May 29th, sir.

Q. Do you recall that anything was said about, by either party, concerning the money proposal on May 29th? A. I don't believe so.

Q. On May 29th, did the Union accept any of the proposals made by the Company at that time? A. I don't believe there was any acceptance on the Union's part to any of the Company's proposals on May 29th.

Q. Was there any discussion on May 29th concerning this right to initiate or review standards on the part of the Company? A. Yes, sir.

John Ayers—for Respondent—Direct

Q. Tell us what was said. A. Well, there was considerable discussion. That was one of the Company's proposals and the Company and the Union spent the better part of May 29th reviewing each other's proposals [355] as to the reasons for the Union's wanting theirs and the reasons why the Company was wanting theirs, and the reaction or the objections of the other party, the reason why they didn't feel they should go in. Now, as far as the proposal for the right of the Company to institute revision of standards, that was the particular one you asked me about?

Q. Yes. A. The Company had that proposal up and there was a verbal discussion on that as to why the Company felt that would be necessary. A portion of that continued on, that there must be some prima facie evidence that the standard was in error before a revision or request for revision of standard, or review of standard, could be made on either party. The Company had had considerable experience in request for reviews of standards from its people when actually the standard was producing an incentive result much in excess of what the contract provided for.

Mr. Statham: I make a motion to strike that, unless that is voiced in his opinion, of course.

Trial Examiner: I think it is pretty obvious that is his opinion. This was said at the meeting.

Mr. Statham: Oh, I see. I'm sorry. I withdraw my motion.

A. (Witness, continuing) It was pointed out that the contract provided for 20 to 25%, on the average, for incentive.

Mr. Raphael: Let's get the name of the speaker. Who was [356] pointing it out?

Trial Examiner: I think the point is well taken. Who pointed—can you tell who pointed it out?

John Ayers—for Respondent—Direct

Mr. Raphael: Who pointed it out to whom?

The Witness: I imagine I pointed it out in the discussion.

Mr. Raphael: You imagine you did? All right.

Mr. Statham: Do you know?

The Witness: I would say it was either myself or Mr. Bethell; one or the other of us pointed it out. As to which one of us made the statement, it is hard for me to say. The two of us sat in the negotiations for the Company and many times I would mention something to Ed and he would make the statement. Other times I would make the statement myself. But it was pointed out to the Union that that was the contractual provision in the contract and that the records of the Company showed that the incentive earnings were in excess of that—well, just as an illustration, say 135, 140%, on a particular job, and that we have had many cases where an employee has put in a request for review of that standard even though he was already earning 135 or 140% on the standard. Now, the Company felt that that was an undue load on the engineering system since this was already evidenced by the employee's own earnings. It was pointed out the reason we requested this particular clause, that we felt it was an undue load on the engineering department to have to [357] restudy these rates which are already producing satisfactory, contract-wise, earnings. By the same token, there were some incentives in existence which were creating—which were producing for the employees an excessive amount. And if you want me to explain—

By Mr. Clark:

Q. That's all right, Mr. Ayers. The point is that there was discussion about this particular point? A. Yes, sir.

John Ayers—for Respondent—Direct

Q. As outlined by you? A. Yes.

Q. Now, on the May 29th meeting, did you have an occasion to discuss the financial condition of the Company with the Union? A. There may have been some statements made on May 29th concerning the financial situation of the Company, yes, sir.

Q. Do you recall what was said concerning the financial situation, that is, explaining to the Union what the financial condition was? A. Yes, we—

Mr. Statham: Now, if they are getting that specific—he did say maybe there was. Does he know who said it, or what time did he say it, or—

Trial Examiner: I think you should bring out, Mr. Clark, who said it.

Mr. Clark: I don't mind doing it at all, Mr. Trial Examiner. This is merely in the interest of saving time. If [358] you want me to do it, I would be happy to.

Trial Examiner: They are entitled to know who the speaker was.

Mr. Clark: Yes, I think they are.

By Mr. Clark:

Q. Mr. Ayers, did you make a statement to the Union representatives concerning the financial condition of the Company? A. On the morning of May 31st, I believe, was when that statement was made, sir.

Q. Did you on May 29th? A. I don't remember any particular statement with regard to the financial condition of the Company that was made on May 29th.

Q. Let's go to May 31st. As far as the financial position of the Company is concerned, tell us what you told the Union at that time. A. I told the Union, in discussion of the financial condition of the Company, that the Company

John Ayers—for Respondent—Direct

had been losing money. We had been in a loss for four years and that we were in a loss position up to this time for the current year of 1961, and that we had done everything we could to cut our expenses in every respect with regard to management of the business, with regard to overhead in the business, and so on. We had made some reductions in those things, but we still didn't seem to have this thing licked. We advised them that—or I advised [359] them—of what their own earnings had amounted to since 1957, and in 1957 they had an average of \$1.44, whereas at this time they were averaging \$1.78 straight time and \$1.83 overtime.

Q. What percentage of increase was this? A. That amounted to 24% increase, sir.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

By Mr. Clark:

Q. You say it represented a 24% increase? A. The increase in wages of the people amounted to 24% increase over this period of time. We also advised them that the increase in the cost of living had only gone up 5% in this particular time, which indicated that these people had enjoyed a very much greater increase in their earnings than the cost of living had increased during that period of time.

Q. All right. Did Mr. Campbell make any proposition thereafter on this May 31st meeting concerning the money proposal? A. Yes, sir.

Q. What was it? A. His proposition was two cents across the board, and an additional paid holiday which they asked for, which was Christmas Eve, and with those wage increases they would take the old contract with the changes already agreed upon.

Q. What were these changes that had already been agreed [360] upon? A. At that time, the agreement on the

John Ayers—for Respondent—Direct

Company's side was that we would add the mother-in-law and father-in-law to the qualification clause for holiday pay, and the Union had agreed to the stipulation provision with regard to discussion on the rates, where the discussion would contain only the time required, number of minutes required, or on the number of pieces per hour, and by mutual agreement the method to be followed.

Q. After this proposition by Mr. Campbell, did you thereafter again go over the money situation with the Union?

Mr. Statham: I object to the highly leading questions again.

The Witness: After the—

Trial Examiner: Just a minute.

The Witness: Excuse me.

Trial Examiner: Will you read the question, please?

(Question was read.)

Trial Examiner: Well, it is close. I am going to rule he can answer the question.

The Witness: Yes, we did.

By Mr. Clark:

Q. What was said, and did you say it? A. Yes, sir. I said it after lunch this time. I believe we had adjourned for lunch after the Union had brought in their [361] money demand. We adjourned for lunch, and then came back after lunch and the Company again repeated and the Company again—myself—stated many of the things that we had said that morning with regard to our lost position. I believe at this time I brought out the fact that—I brought out what our labor cost was doing to the over-all cost of our operation in that in 1957 it amounted to 21% of our cost of business and of our production, whereas today it was

John Ayers—for Respondent—Direct

27%, and pointed out that this was well in excess of what this percentage was in other furniture companies. I pointed out that this was—I said that this was something we had to control and try to put it down, if at all possible.

Q. Were any possibilities suggested by you at that time?

A. I pointed out to them that there were two of the items which we asked for—which we were asking for—which were items that they could help us on, on our particular situation with regard to our labor cost. I also pointed out, too, there were several things we could have asked for in the negotiations but we didn't. I pointed out that we considered coming in and asking for a reduction in that adder, the eight cent an hour adder. In our discussions back and forth across the table, somebody said something about the incentive system, and I said, well, if they wanted to drop that, they might even consider that. I don't believe that they were serious and I don't believe that I was either.

[362] Mr. Statham: I object to his statement of the Union not being serious. I move to strike.

Trial Examiner: Is there any objection?

Mr. Clark: No objection.

Trial Examiner: All right, the motion to strike is granted.

A. (Witness, continuing) I did point out to them that—two points—the absenteeism clause and the grievance clause, and that these then were two items in which we could reduce our costs. We asked for grievance meetings after Company hours at this time, which would take the cost of that away. I explained to them that it was more than just the cost of the stewards themselves in the meeting, but that it was the cost of our own personnel, the cost of taking our foreman out of the departments, and so on, with regard to these meetings, these grievance meetings.

Then I pointed out the absenteeism clause would assist

John Ayers—for Respondent—Direct

us in our operations in knowing more about who was there, or who was going to be there, or when they were going to be back, and so on, that they could greatly assist in our cost of operation with these items especially.

Q. After your discussion of these money items with the Union that you have just outlined, what, if any, comment was made by the Union representatives concerning the money items? A. The Union observed—Mr. Louie Campbell, I believe, in [363] particular, observed that frankly, unless there was some money on the table, that we couldn't expect any changes in the contract, any further changes in the contract. I believe that was their only reaction to those.

Q. Mr. Bethell testified that Mr. Campbell made the statement that, to the effect of whether the Company was interested in a strike or wanted a contract. Do you remember that? A. Well, yes, sir. After this conversation I have just related with regard to the Company's position, there was a recess and when they returned from that recess it was going up toward the middle or the latter part of the afternoon. Mr. Campbell started his remarks—prefaced his remarks—with the question, "Well, do you fellows want a contract or do you want a strike?" And both Mr. Bethell and myself assured him that we wanted a contract and were not interested in a strike. Then Mr. Campbell replied as to the Union's position.

Q. And what was that position? A. That they were willing to drop their money demands if we would drop our other contract demands, and that they were willing to take the old contract with the changes agreed upon for another year.

Q. You say with the changes agreed upon? A. Yes, sir.

Mr. Raphael: I object to that and move it be stricken.

Trial Examiner: The last question and answer?

John Ayers—for Respondent—Direct

[364] Mr. Raphael: Yes, I object to it as leading.

Trial Examiner: I will sustain the motion to strike.

By Mr. Clark:

Q. Mr. Ayers, I will ask you if, at any time, the Union representatives offered to take the contract representing no wage increase, that is, the old contract, with or without the changes made?

Mr. Raphael : I object to that as highly leading and suggestive. He can ask them—he can ask what the Union representatives said so we can cross-examine him.

Mr. Clark: All right.

Trial Examiner: Are you withdrawing the question? Well, let's hear the question.

(Question was read.)

Trial Examiner: I will overrule the objection. Answer the question.

The Witness: No, sir, they did not make that offer.

By Mr. Clark:

Q. At this point—

Trial Examiner: In other words—let me understand this. In other words, what you are saying is they didn't make an alternative offer?

The Witness: That's right, sir. They did not make the offer with or without.

Trial Examiner: They didn't make it in an alternative manner?

The Witness: No, sir.

John Ayers—for Respondent—Direct

[365] Trial Examiner: Am I interpreting you correctly?

The Witness: Yes, sir, that's right. In other words, they came back with—

Trial Examiner: All right, go ahead.

By Mr. Clark:

Q. Mr. Louie Campbell testified on direct examination yesterday that he made the Company an offer of taking the old contract without any wage increases, extending it for another year, with or without the changes that had already been agreed upon. Do you recall Mr. Campbell making such an offer? A. No, sir, I do not.

Q. Now, then, the point here where Mr. Campbell made a proposition about being willing to drop their money demands if the Company would drop its contract proposals, what was said after that concerning this and who said it? A. Would you repeat that question again?

Q. Let me withdraw that question. What happened at this meeting—at this negotiating session—after Mr. Campbell made this proposition? A. The Company recessed and, upon returning from the recess, stated to the Union that there were still three propositions which we felt had to have consideration, and that we had to have some help on before we could enter into a contract.

Q. What were these propositions? A. The three propositions the Company felt were important [366] at this point were the vested rights clause, the grievance meetings after company hours, and the absenteeism—unreported absenteeism clause.

Q. Well, what happened then? A. Then we went into some discussion explaining to them just why we felt we had to have each one of these things. We pointed out to them in the vested rights clause the reasons for the request for this.

John Ayers—for Respondent—Direct

Q. Will you state those reasons as stated then? A. We pointed out to them that the incentive system, as designed, was not designed to carry forward the past average earnings of an individual and, in effect, the decision that had been handed down by Father Brown had put this into the contract, in our opinion, and that we did not feel that that was the way—did not understand that that was the way the incentive system was supposed to work. We had been under the incentive system for four years without this being any problem, and we explained to them that that, in no way, changed the reason for making an adjustment. It gave us no right to make an adjustment that we did not already have, that actually the contract was written—as it was originally written—recognized the principle that we were asking for here. We were merely asking for it in a manner of clarification of the stipulation.

Q. Was anything said about whether this was subject to the [367] grievance procedure? A. Yes. It was pointed out to the Union Committee that any action by the Company with regard to incentive system or standards, or its application, was subject to the grievance procedure, and that the application of this vested rights clause did not change in any way the rights that they had under the grievance procedure and arbitration as it now existed, and it was not our intention to change that.

Q. Was that the extent of what was said concerning the incentive proposition? A. That was pretty well the picture as I presented it, sir.

Q. Go ahead, Mr. Ayers, and tell us what happened thereafter at this May 31st meeting? A. We talked a little longer and then Mr. Campbell asked us to reconsider again our proposals. We recessed and we—and then when we returned this time we advised the Union that we had made some changes, modifications, in our demands regarding the grievance meetings and regarding the reporting on absenteeism. We also explained to them that the vested rights clause, that it was the—that if the wording was

John Ayers—for Respondent—Direct

to their dislike that we were open to consider any wording which they might come up with, or might suggest, which would mean the same thing as far as we were concerned, that we were not bound to any words. We explained to them that the grievance procedure—that we were willing to go along with instead of [368] having grievance meetings after hours that we were willing to go along with the grievance meetings being limited to three stewards, to one hour per week, and payment at base pay. And then on the absenteeism clause, that we wanted at least something in there which would indicate some obligation on the employee's part to report absenteeism, how long he was going to be absent. We suggested that we put in a clause that would say the employee merely should report it to the Company when he is going to be absent and the expected date of his return. There were no teeth in this clause. It was merely a request that they should do so—an admonishment, if you want to call it that.

Q. Then what happened in relation to these proposals?

A. We talked about them a little more and then it was getting late and we told Mr. Campbell that this was our last offer, that it was the best we could do, that we had gotten these things down as far as we felt we could, and so he said, "Well, if that's the last offer you have got, then put it in writing and I will take it to the people, but we can't recommend it." I said, "I can't help it, Louie, if you can't recommend it; you will have to take it to the people and vote on it."

Q. Let me stop you right there, Mr. Ayers. A. Yes, sir.

Q. You heard Mr. Campbell testify that you gave him these [369] proposals and said that "that's it, take it or leave it." Did you make such a statement? A. No, sir, I did not make such a statement.

Q. Continue now and tell us what happened. A. I wrote out in longhand the six items—the first three are items which we had agreed upon previously, and then added the

John Ayers—for Respondent—Direct

other three items which the Company felt it needed for a contract. I presented Mr. Campbell with a copy of these and gave Mr. Bethell the second copy, in my own handwriting. Then Louie objected strenuously to the situation and advised that they wouldn't be able to recommend it to his people, that he would take it back to them but that he wouldn't recommend it. I again told him that's all I could do, that this was it, that's all there was, and to take it to the people and let them vote on it.

Q. Did the meeting thereafter adjourn? A. Yes, it adjourned.

Q. When did you next hear from Mr. Campbell? A. It was up—I don't exactly remember what time it was, but I think just prior to noon the next morning when Louie called and said the people had turned down our proposal.

Q. Was the plant ready to produce at that moment? A. Yes, sir, the plant was open for production.

Trial Examiner: What time of day was it?

The Witness: At the time Mr. Campbell called me?

[370] Trial Examiner: Yes.

The Witness: To the best of my knowledge and recollection, it was around—oh, 11:00 o'clock or so; sometime late in the morning.

Trial Examiner: Thank you.

Mr. Clark: Excuse me, did you state what Mr. Campbell told you in the conversation? I am asking for information—did the witness state what Mr. Campbell told him in the course of the conversation?

Trial Examiner: Do you want the answer read back?

Mr. Clark: Could we take a recess?

Trial Examiner: We will take a five-minute recess.

(Short recess was taken.)

John Ayers—for Respondent—Direct

Trial Examiner: Let the hearing come to order.

Mr. Clark: I asked, before recess, for the Reporter to read back a certain portion of the Answer last given by the witness to me. The Reporter has read it back and I am satisfied with the answer, and we will now proceed.

By Mr. Clark (Continuing):

Q. Mr. Ayers, you have testified concerning the Company's financial condition during these negotiations. I will ask you whether two or three years prior to this time your Company was experiencing financial difficulties? A. Yes, sir, we had lost money every year starting with 1957.

[371] Q. I hand you a sheet of paper that purports to be a summary of the Company's financial condition for the year 1957, also for the year 1958, and for the year 1959. I will ask you to identify this document and tell us whether or not this reflects the Company's financial condition during those years?

Mr. Statham: I am going to make a procedural objection here.

Mr. Clark: May we have that marked for identification.

Mr. Statham: I don't object to its being identified, but if the question asks for anything more I will object.

Trial Examiner: That would be Respondent's Exhibit 7.

(Thereupon, the document above-referred to as Respondent's Exhibit No. 7 was marked for identification.)

John Ayers—for Respondent—Direct

By Mr. Clark:

Q. Mr. Ayers, I hand you what has been marked Respondent's Exhibit 7. What is that, please, sir, and what does this reflect? A. This reflects a statement of income and expense for the four years, 1957, 1958, 1959 and 1960, for the Fort Smith Chair Company.

Mr. Clark: I would like to offer this into evidence, if your Honor please.

Mr. Statham: What is the purpose of the offer?

Mr. Clark: The purpose of the offer is to establish the [372] financial condition of the Company, not only at the time these negotiations were in progress, but also for the years leading up to the time that these negotiations for this particular contract commenced.

Mr. Statham: We do not ask for receivership or anything, so why is this material?

Mr. Clark: Why? Well, Mr. Ayers has stated that he explained the financial condition of the Company, and I think that this would be the best evidence of the financial condition of the Company rather than his statement concerning its condition.

Mr. Statham: We are not making a motion to strike, but we think it is repetitious.

Mr. Clark: Some of the decisions I have read criticized the fact that even though it was not objected to, the best evidence would have been a ledger sheet or some other tangible document.

Trial Examiner: Where do we stand here now? There is an offer of the document, and there is an objection. Is that correct, Mr. Statham, or—

Mr. Statham: Beg your pardon?

Trial Examiner: Are you objecting to the receipt in evidence of this document?

John Ayers—for Respondent—Direct

Mr. Statham: As I recall, his testimony was that he told the Union what the financial shape of the company was.

Trial Examiner: I want to find out where we stand here. [373] Is that an objection to the offer or not? I want to find out if there is anything for me to rule on here.

Mr. Statham: Let me examine the document.

(Counsel examines document.)

Mr. Statham: May I ask him some preliminary questions?

Trial Examiner: Certainly.

By Mr. Statham:

Q. Did you prepare this, this document? A. It was prepared by our auditor, Mr. Swafford.

Q. It was not prepared by you? A. No, sir.

Q. Therefore, you have no way of knowing whether it is—well, strike that question. A. I can prove its authenticity, if that's what your question is.

Q. I didn't hear your last comment. A. I can prove the authenticity, if that's your question.

Q. But it was not prepared by you? A. I said it was prepared by our auditor. This is part of our annual report of the Company and its condition.

Mr. Statham: We won't make any technical objection about the foundation, but I do think it is immaterial. I think maybe what they told the Union is relevant, but I can see no use, or no reason, for the reports themselves.

Trial Examiner: I understand that your objection to the receipt in evidence is not on the ground of authenticity, but [374] on the ground of immateriality. Is that right?

John Ayers—for Respondent—Direct

Mr. Statham: Well, I wouldn't stipulate to their authenticity. Both grounds.

Trial Examiner: Mr. Ayers, did you say this is part of the Company's annual report?

The Witness: Yes, sir.

Trial Examiner: Part of their regular records kept in the course of their business?

The Witness: Yes, sir.

Trial Examiner: I will overrule the objection on the authenticity under the authority of the Federal Statute on the subject of business entries.

Mr. Clark: Exception to the hearsay rule?

Trial Examiner: Yes, sir, the statutory exception. The statute involved is 28 USC Section 1732, having to do with admissibility of business records.

Mr. Raphael: I don't think there is—well, I guess he said it was part of the annual report, but I don't think this is the annual report that we have got here—I mean that it is not within the business entry rule, because there is no witness on the stand who can testify concerning the nature of the entries, the regularity of their keeping; and, moreover, there is no evidence to show that this is the original document. The exception to the hearsay rule on business entries was the collateral guarantee of having the man testify [375] concerning the regularity of performance and who had the duty of making the entries. That is what let it in. We haven't even got that here.

Trial Examiner: Well, in the case of *NLRB vs. Sharples Chemicals, Inc.*, 209 Fed. 2nd 645, those will be admissible business records as a business record under the statute referred to, and the documents must be identified as a corporate record and testimony regarding the matter on which it was prepared. I think he testified who prepared it and that

John Ayers—for Respondent—Direct

it was part of the corporate records of the Company.

Mr. Statham: He testified that the auditor made it, but—

Trial Examiner: This auditor that made the report, is he somebody in your firm or—

The Witness: He is a C.P.A., sir.

Trial Examiner: I think that is enough.

Mr. Statham: I think that if you bring in business records that you must bring in the person who prepared them, who can tell us how they were prepared. If not, in that event, I suppose he could have Mr. Bethell get up and say it was prepared by a C.P.A. and we would be precluded from—

Trial Examiner: I think it would be admissible.

Mr. Raphael: I make an objection on the further ground that a record made by a C.P.A. is not a record within the meaning of the Federal Statute to which you just referred.

Trial Examiner: I will overrule the objection as to the [376] authenticity and I will sustain the objection as to the materiality. I cannot see how material it is unless, Mr. Clark, you are going to show that this document was exhibited to the Union during this period of time, and I take it you are not going to show that?

Mr. Clark: No, sir.

Trial Examiner: Therefore, I reject the document, not on the ground of authenticity, but the ground of materiality. I will instruct the Reporter to bind it with the rejected exhibits.

By Mr. Clark (Continuing):

Q. Mr. Ayers, were you present at the meeting that occurred on June 7, 1961, with the Federal Mediator? A. Yes, sir, I was.

John Ayers—for Respondent—Direct

Q. And I believe it has been testified to that essentially the same Union representatives were present at that particular meeting, is that correct? A. To the best of my knowledge, yes, sir, the same Union people were there, with possibly one or two exceptions.

Q. At that meeting, Mr. Ayers, what was said by the Company pertaining to any proposals that might have been made previously? A. The Company outlined to Mr. Wheeler their position on the proposals which they had made.

Q. I believe the Union did the same thing? [377] A. The Union did the same thing.

Q. Did that meeting with the Federal Mediator result in any differences being resolved between the parties or not? A. I don't believe there were any differences directly resolved. The Company and the Union discussed the proposals again. There was some comment made from the Union side that on one, or some of them, that it wasn't important enough that they would stay out on strike over it; that the Company made no change in its position on any of the proposals, but it did say again, repeated again, that it wasn't wedded to the vested rights wording, that we would consider other wording on that if that would help.

Q. Let me ask you this question, Mr. Ayers. You heard Mr. Bethell testify that he discovered at that meeting that the proper notices were not sent. You heard him also testify that he made a statement that the Company was not waiving any of its rights by participating in that meeting.

Mr. Statham: That is very leading.

Trial Examiner: I will sustain the objection.

By Mr. Clark:

Q. What, if anything, was said concerning notices at the meeting?

John Ayers—for Respondent—Direct

Mr. Statham: I would like to make this request. We all know that once a leading question is asked, why, the harm is done. I think sometimes it is proper, if a leading question persists, that a counsel be instructed to please make his [377a] questions as non-leading as possible. I am going to make such a request now.

Trial Examiner: I am sure counsel will try not to lead the witness.

Mr. Clark: I will try not to ask any more leading questions.

Trial Examiner: Now answer the question before you.

The Witness: What was the question?

Trial Examiner: Will you read the question, please?

(Question was read.)

The Witness: There was some discussion at the beginning of the meeting concerning the sending of the notices, back and forth between Mr. Bethell and Mr. Campbell and Mr. Wheeler. At the conclusion of this particular discussion regarding notices, Mr. Bethell made the observation, or made the statement, that the Company would continue in the afternoon meeting only under the condition that we reserved whatever rights we might have should it develop conclusively that the notices were not received.

Q. Thereafter, did you adjourn? A. After that particular statement was made, we went over the proposal and discussed them.

Q. You have already testified to— A. We went on throughout the afternoon in the discussion.

Q. What time did you adjourn that afternoon? A. Adjournment was toward the latter part of the afternoon.

John Ayers—for Respondent—Direct

[378] It seems to me it was in the neighborhood of—oh, 4:30 or 5:00 o'clock.

Q. Mr. Ayers, I will ask you this question. Between May 31st and June 7th, did the Union offer to allow its members to continue to work on a day to day basis until the differences could be ironed out? A. No, sir. The Union made no offer to come in and go to work on any condition.

Q. Did the Company ever threaten a lockout? A. No, sir, they did not.

Q. Was there any suggestion made by the Union to continue under the old contract? A. No, sir, except for their contract offer on the 31st, their last offer, that they would take the old contract with the changes agreed upon, with no wage increase.

Q. Now, what then was the Company's situation on June 1st with regard to production? A. The Company was ready for production. I mean our gates were open. All our supervisory people were there. Our office people were in attendance. If the people had come down to go to work, why, the plant was ready for them.

Q. Did you tell anybody—did you tell the Union or anybody else that they couldn't work until the contract was signed? A. No, sir.

Q. You have sat in on negotiating sessions before, haven't [379] you, Mr. Ayers? A. Yes, sir, for quite a few years.

Q. Do you know of any Union voluntarily relinquishing a concession that had been made by a company?

Mr. Raphael: I object to that.

By Mr. Clark:

Q. Do you know of this Union relinquishing a concession that had been made by a company?

John Ayers—for Respondent—Cross

Mr. Raphael: I object to that.

Mr. Clark: By this company?

Trial Examiner: State the basis of your objection.

Mr. Raphael: It is the same as the objection I made previously. The bases of it are the same. Whether or not he knew of this Union in negotiation with this Company ever relinquishing a concession is wholly immaterial. The question is what did they do here.

Trial Examiner: All right, I will rule as I did there. I will limit it to the last five years. Your objection was that it was too remote?

Mr. Raphael: That is one of about six that I tried to name.

Trial Examiner: That's right, that was one of them. I will limit it to the last five years and, with that limitation, I will overrule the objection. Answer the question.

The Witness: In the last five years of negotiations, I have not known the Union to retract for a position to which [380] the Company had agreed to.

By Mr. Clark:

Q. That's your experience with Local 270? A. As far as my personal connection with negotiations with Local 270—with this company.

Mr. Clark: That's all.

Trial Examiner: Cross-examination.

Cross-examination by Mr. Statham:

Q. Mr. Ayers, was the plant open between June 1 and June 8th? A. The gates were open, sir, yes.

John Ayers—for Respondent—Cross

Q. Was the plant operating between June 1st and June 8th? A. There was no particular production work going on. We had our supervisory force there and they were doing cleanup work and various work around in the plant.

Q. That's all the work that was done in the plant? A. It is possible that a sample or two was worked on.

Q. Did you employ any employees between June 1st and June 8th? A. No, sir. Do you mean new employees, sir?

Q. Yes, sir. A. No, sir.

Q. When did you start employing new employees? A. The first new employee was hired on June 12th.

Q. And when did the plant go in operation? A. On June 12th.

Q. How long had some of the—well, I believe that is in [381] evidence, excuse me. Why did you discharge the employees—

Mr. Clark: I object to that.

Mr. Statham: I haven't finished.

By Mr. Statham:

Q. Why did you discharge the employees and employ a new work force?

Mr. Clark: I object. That question calls for a legal conclusion.

Trial Examiner: No, I don't believe it does. I think he has asked for his reasoning. I will allow it. Will you answer the question, please?

The Witness: That is a difficult question to answer, sir.

John Ayers—for Respondent—Cross

By Mr. Statham:

Q. Now, Mr. Ayers— A. I just want to explain myself. That wasn't the end of my answer. The discharging of these employees was done after several sleepless nights and a lot of thinking. The situation that we were in, our loss picture that this Company had experienced over a number of years, and the harrassment that we had experienced, especially during the last five or six years, from the particular Union organization with which we had had a contract, and our difficulties in obtaining changes in working conditions which were causing the Company financial difficulty, the uncompromising position of the Company, of the Union in many respects, and the negotiations with regard to changes of the contract. All those aspects entered into the [382] situation of our taking the position we did with regard to these employees. And it was only through wiping the slate completely clean and starting over that we felt that we could find the answer to the possible survival of this Company, from an economic standpoint.

Q. I see. Are you through with your answer now? A. Yes, sir.

Q. This is the complete answer, I take it? A. Well, it pretty well covers the subject.

Q. Yes, sir. Now, did you give your employees any warning that you were going to discharge them?

Mr. Clark: I object to that question. The question of warning is not material to these issues here at all.

Trial Examiner: No, it is not material. It is not material, but I am going to allow the cross-examination on it. He may be leading up to something else.

Mr. Clark: All right.

John Ayers—for Respondent—Cross

By Mr. Statham:

Q. Will you answer the question? A. We gave them no warning, as such, other than the reservations which were made by our attorney at the meeting of June 7th.

Q. Well, did you give the Union Negotiating Committee any warning that you were going to discharge these employees?

Mr. Clark: He just answered that. I object to that.

Trial Examiner: He doesn't have to accept the answer, [383] Mr. Clark. This is cross-examination. He may feel that by changing a few words here and there he may be able to get a different answer. Maybe he wants a different answer—I don't know. Answer the question.

The Witness: No warning other than that given by our attorney on the 7th with regard to reservations of rights.

By Mr. Statham:

Q. In other words, he just said he reserved his rights to continue to bargain, didn't he? A. No, sir, he reserved our rights to our Company's position in light of the possible illegality of the strike, sir.

Q. That was the only warning given? A. Yes, sir.

Trial Examiner: Is it the contention of the General Counsel that failure to give warning in a situation of this sort is at all significant?

Mr. Statham: I think it well may be a material fact.

Trial Examiner: Well, I won't ask you to explain it now, but in your oral argument you can. Go ahead.

John Ayers—for Respondent—Cross

By Mr. Statham:

Q. Now, you testified that you started—strike that. I want to get into something else first. You have testified that the Union never made any offer—I don't know your exact words, but I mean in substance—to the effect that they would not agree, that they would not agree to extend it or renew the existing contract for another year's [384] term without a wage increase. is that right? A. That they would not extend the current contract without a wage increase?

Q. Yes. A. They said that they would extend the current contract with no wage increase, plus the changes already agreed upon.

Q. And they even offered to extend the existing contract without those minor modifications, did they not? A. They did not make that statement, sir.

Q. Have you ever heard the Union state that they were willing to do that? A. Not in those negotiations, sir.

Q. Well, through the course of this strike, did it ever come to your attention that the Union was willing to do that? A. No, sir.

Q. You never read anything where the Union stated that was what it was demanding? Are you saying that? A. Excuse me, sir. I have heard sometime since then, and I have heard a number of times at this hearing, that the Union said that they made that statement, sir.

Q. All right. What about while the strike was still going on, did you ever hear the Union—did you ever read where the Union was stating that that was what the demands were? I mean that it had dropped its demands and was just wanting the existing contract for another year? [385] A. Well—

Mr. Clark: Just a minute. I object, your Honor. He should specify when, time and place, and under what circumstances.

John Ayers—for Respondent—Cross

Mr. Statham: No. sir. This is cross examination.

Trial Examiner: Wait a minute. Let me hear the question

(Question was read.)

Mr. Statham: I will withdraw the question.

By Mr. Statham:

Q. While the strike was going on by Local 270, did you ever hear, or read, that the Union was only wanting the existing contract to be renewed and was not even asking for a wage increase?

Mr. Clark: I object to that, unless it was made to some responsible individual, and the time and place.

Trial Examiner: Well, I think he can answer it yes or no. If he says yes. I will then require the time and place and who was present.

By Mr. Statham:

Q. Can you answer that now? A. Yes, I have read that, sir.

Q. Where? A. On pamphlets distributed by the Union.

Q. All right. What date? A I cannot state any specific date. Those pamphlets were distributed on numerous occasions. There were numerous [386] different pamphlets throughout the summer and early part of the fall.

Q. Throughout the early summer they started distributing those pamphlets, isn't that right? A. Sometime after the strike had commenced.

Q. Well. how long? Can you estimate it at all? A. I have got a note over there to the effect as to the first time that that came out, if you would like for me to refer to it.

John Ayers—for Respondent—Cross

Q. You have no independent recollection? A. I can't remember the exact date, sir. It was in the summer, up in the latter part of June—middle or latter part of June.

Q. And, as a matter of fact, you read the newspapers—you read it in the newspapers through advertisements placed there by the Union, that all they were wanting—all they had asked for—was that the existing contract be extended for another year and that they had dropped their other proposals. Isn't that true? A. Well—

Mr. Clark: I object to any further questions along this line, for this reason, that the only obvious purpose of it is an attempt by the General Counsel to prove facts made by the Union pertaining to testimony as to material facts by his witness, and he is attempting to do indirectly by this witness [387] what he couldn't do directly by the other witness.

Trial Examiner: I don't think that is the only possible purpose. His purpose may very well be impeachment. I will overrule the objection. Answer the question.

The Witness: Yes, sir, I have read advertisements by the Union in which they had made that statement, yes.

By Mr. Statham:

Q. The Fort Smith News, isn't that true? A. Yes, sir, the Fort Smith News.

Mr. Clark: I object.

Trial Examiner: What did he say?

Mr. Statham: The Fort Smith News.

Trial Examiner: Oh, the Fort Smith News.

Mr. Clark: I object.

John Ayers—for Respondent—Cross

Mr. Statham: I am just establishing where he read it.

Mr. Clark: Let me state a further ground for my objection, if your Honor please, that actually these circulars and these advertisements in the paper only constitute self-serving declarations as far as the Union is concerned, and he is trying to put it all into evidence here by cross-examination of this witness.

Trial Examiner: I think it is immaterial, if that is what's bothering you.

Mr. Clark: I think it is, too.

Trial Examiner: But he has a right to try to impeach the witness.

[388] Mr. Clark: If it is an attempt to impeach the witness. he laid no foundation for prior inconsistent statements.

Trial Examiner: Well, I am going to give him a chance. He doesn't have to flag it.

Mr. Clark: Do you mean he can ask whether or not Santa Claus came last Christmas?

Trial Examiner: No, no. This witness has testified under cross-examination, by questions from the General Counsel, that the Union—he has denied the Union ever stated to him that it was willing to renew the old contract without any change, and I think he has a perfect right to seek to impeach that statement of the witness by a round-about method.

Mr. Clark: I fail to see—

Trial Examiner: He doesn't—it doesn't do him any good to keep asking the same question in the hope he gets a different answer. He can go around. Now, the last question was with regard to the Fort Smith News, wasn't it?

Mr. Statham: I believe the witness has answered that.

John Ayers—for Respondent—Cross

By Mr. Statham:

Q. You did, I believe, answer that? A. Yes, sir, I did read an advertisement in the Fort Smith News to that effect.

Q. When? A. I don't know that, sir; sometime last summer when it was represented, I imagine.

Q. Well, I think that is a logical answer, but do you know [389] when it came out in the paper? A. I have got a copy in my desk, but I do not know what the date is on it, sir.

Q. What is your best estimation of the date? A. I believe that came out sometime—probably in July, sir. That would be my best estimate of the time on that.

Trial Examiner: Obviously, what the Union put in an ad in July is not material as to what its intent was in striking June 1st, if that is worrying you, Mr. Clark.

Mr. Clark: Yes, sir, that is my main worry.

Trial Examiner: You don't need to worry about that.

Mr. Clark: All right, sir.

Trial Examiner: I didn't let it in to show the Union's intent. I let it in for impeachment.

By Mr. Statham:

Q. After you discharged these employees, did you ever make any offer that if they would end their work stoppage and return to work that you would reinstate them? A. No, sir.

Q. Now, you testified that you started employing new employees on June 12, 1961? A. Yes, sir.

Q. What rate of pay did you employ those employees at?

John Ayers—for Respondent—Cross

Mr. Clark: I object. That was not gone into on direct examination.

Trial Examiner: I will sustain. I can't see that could [390] even be used for any impeachment purposes. I mean I can't see where you could even get around to anything that is material.

Mr. Statham: I think this is material. They have been testifying here that all through these meetings of May 29th, May 31st and July 7th, that they were not going to change these rates, and they said that "this doesn't really change anything". Mr. Bethell knew they weren't lawyers.

Trial Examiner: Your own witness testified that was their attitude, too.

Mr. Statham: Right. There is no question but—

Trial Examiner: The dispute is between the two groups of witnesses, that those statements were—

Mr. Statham: There is no question but what they tried, though unsuccessfully, to convince the Union people that they, for some reason, wanted to add a clause to the contract that would have no meaning at all. It was just an extra wordage, for some reason, for some reason they thought—I don't know, it might look pretty or something in the contract. That was their attitude toward it to the Union. I think the evidence is going to show that—I think the evidence is going to show clearly what their intent was. as evidenced by what they did later, and I will offer to prove, by this witness, that they changed the incentive levels and reduced them drastically. They also changed the base rate.

[391] Trial Examiner: But this isn't an attempt to impeach his testimony that they told the Union that wasn't going to have that effect. Your own witness has said, and the Union's contention is, I think, to show bad faith on the part of the Company

John Ayers—for Respondent—Cross

throughout these negotiations. I don't think bad faith on the part of the Company is at all material here.

Mr. Statham: In an 8(a)(5) case, the good faith or bad faith of the Company certainly is a question.

Trial Examiner: Well, I thought the defense here was the lack of majority, and that the Union didn't have majority. I don't think that bad faith is. Besides, you are attempting to show bad faith in a period in which you have stated on the record you contend there wasn't any 8(a)(5). Your complaint, and your whole case, is presented on an 8(a)(5) on June 8th and thereafter, and you have stated on the record that you are not contending there was a refusal to bargain before then.

Mr. Raphael: May I be heard briefly?

Trial Examiner: Yes, sir.

Mr. Raphael: I think that there are two points that ought to be emphasized in connection with this testimony. First, even though the complaint doesn't allege refusal to bargain earlier than June 8th, evidence that there was a refusal to bargain earlier than June 8th would be highly relevant.

[392] Trial Examiner: I have admitted that as background. I have already ruled that.

Mr. Raphael: Now, there is another reason why it is admissible. Even if the complaint doesn't charge a refusal to bargain prior to the strike, the facts showing their refusal to bargain, as, for example, bad faith bargaining, would be highly significant so far as the major issues in the case under Section 8(d) are concerned.

Trial Examiner: Well—

Mr. Raphael: I have in mind, of course, Mr. Examiner, if you will bear with me for just a moment.

Trial Examiner: Yes.

John Ayers—for Respondent—Cross

Mr. Raphael: I have in mind, of course, assuming a complaint such as this one, which doesn't allege refusal to bargain prior to the strike, all that you are saying when you say that is this—you are saying that nobody is asking the Board to take affirmative action to effectuate those provisions of the Act under 8(d)(5). But that doesn't conclude the matter. As a piece of evidence, a refusal to bargain is a refusal to bargain no matter what canopy of the Act it comes under. As a matter of fact, the category in which it is placed by way of a legal pleading is wholly immaterial. If an employer—by way of a hypothetical example—says under no circumstances will I, at any time, sign an agreement with XYZ Union, and I mean it, and I am telling you I mean it, [393] and I can't have a Union in the plant, and if I do I will move south, and so on. Even if those facts appear in a case where no charge is made that that employer has engaged in a refusal to bargain, those facts, Mr. Trial Examiner, are relevant, as well as desirable in a complaint.

Now, in this case, where you have evidence which may show a refusal to bargain prior to the strike, it may well be, and we may well urge it, that under the decision in *Maestro Plastics*, the exclusion of any problem relative to Section 8(d) becomes of one order as distinguished from the sort of interpretative inclusion that might be required in connection with Section 8(d) in the absence of alleging a refusal to bargain antecedent to the strike and, consequently, I think all the evidence that bears on the question of bad faith and good faith in any relevant time in this proceeding, any time, whether it is May 29th, May 31st, June 1st, June 2nd, June 8th, June 9th—any time within the encompass of this complaint, has an incisive relevance to every issue—every issue—

John Ayers—for Respondent—Cross

without exception. It has relevance to the discharge. It has relevance to the nature and purpose of the strike. It has relevance to the protected area of the activity, and so forth.

Trial Examiner: It may have some relevance as to background.

Mr. Raphael: All right, you say it may be as to background, and it may well be that you wouldn't want this [394] evidence to come out on cross-examination for some reason—I don't know. I think it has a bearing on credibility while substantively it has a bearing on the good or bad faith of the negotiations, because bad faith in a negotiation is also an index or an inroad into the credibility factors on all the other issues.

Trial Examiner: Well, now, you may—

Mr. Raphael: Whether it was good faith or bad faith, it touches the duty to bargain, and also touches on credibility.

Trial Examiner: You may have a different theory on the 8(a)(5) case than the General Counsel—I don't know—but as I read the complaint, and as I look at the General Counsel's case in chief, I had understood up to this point—and correct me if I am wrong—that the General Counsel was relying on Section 7 to establish an 8(a)(5) and, furthermore, that the defense to the 8(a)(5) was the Union's position of majority prior to sending that telegram, and that both these issues and terms depend on the 8(a)(3) entirely, because, if the discharges were proper, the Union lost its majority. If the discharges were improper, the Union still has a majority. Isn't that the issue in the case?

Mr. Raphael : Yes, sir.

Trial Examiner: Isn't that the way the Complaint is framed? Isn't that your case in chief?

John Ayers—for Respondent—Cross

Mr. Statham: Well, I don't know that it is entirely [395] limited to that.

Trial Examiner: There is certainly nothing in the Complaint alleging bad faith prior to the sending of the telegram. Now, this is a rather late date to change your theory.

Mr. Statham: I am not changing my theory.

Trial Examiner: All right. I will rule that, if you want to show bad faith, that you certainly can't do it through this witness at this point without making him your own, because it wasn't covered on direct. Furthermore, I would also like to point out, lest I be mistaken or misunderstood, that what I think you were trying to do with that question was to prove the truth or the untruth of a statement made to the Union, and that the Company was deliberately lying to the Union in the course of the negotiations, and I am—

Mr. Statham: Well, I certainly—

Trial Examiner: And I am going to sustain the objection, among other grounds, on the ground it wasn't covered on direct. If you want to show good faith and the actual facts, you, at the very least, have to do it by making the witness your own.

Mr. Statham: I would like to point this out. It seems to me you are telling me that the only way I can impeach this witness is not to prove what he said was not true, but I can only prove that he didn't say something which he said he said.

[396] Trial Examiner: No, that definitely is not my theory. I explained very carefully that there was no dispute on this point, that your own witnesses said that, so you obviously are not trying to impeach this witness. Your witnesses testified that this man, during the negotiations, said the Company's position was that they couldn't afford these rates, and

John Ayers—for Respondent—Cross

so forth. Now, this man has corroborated your witnesses on that point. Now, I certainly don't think that you are trying to impeach him on that.

Mr. Statham: No.

Trial Examiner: He corroborated your witnesses on that.

Mr. Statham: Well, let me ask you this. If an employer tells a person that he is fired because he is a very incompetent worker, and that worker testified that his foreman said he was fired because he was a very incompetent worker, is the General Counsel, therefore, bound to prove he was not an incompetent worker, or that this man had actually proven by his actions that this man was not an incompetent worker? I am saying he didn't believe that when he said it because it wasn't true.

Trial Examiner: That is a new theory and you will have to make the witness your own.

Mr. Clark: I would like to say that we will object, and do hereby object, to the Trial Examiner's indication that he will allow counsel for the General Counsel and the Charging [397] Party to make him their witness.

Trial Examiner: Well, we haven't come to that yet. I am not prejudging that.

Mr. Clark: We feel that they should adhere to the allegations in the Complaint.

Trial Examiner: I am ruling that the question was improper because it obviously wasn't asked for impeachment purposes. And if it wasn't asked for impeachment, then it goes beyond direct. That is my ruling.

Mr. Statham: Are you saying that the only questions I can ask him are impeachment questions?

John Ayers—for Respondent—Cross

Trial Examiner: No. You can go over anything that was covered with the witness on direct. You can't set up an entirely new subject without making the witness your own under the guise you are trying to impeach him, when you obviously aren't.

Mr. Statham: All I would like to say is that I certainly remember the Respondent asking several questions to which I objected on the ground of immateriality, to which you—

Trial Examiner: He was attempting to impeach the witness though, and if you are attempting to impeach you don't have to be material.

Mr. Raphael: He doesn't even have to impeach him.

Trial Examiner: And certainly, on this point, he [398] corroborated everything your witness said as to what went on in that meeting on the question of rates.

Mr. Statham: That wasn't the question objected to, as to what took place at the meeting. Well, I guess I will make an offer of proof on that.

Mr. Clark: Offer of proof? Offer to prove what?

Mr. Statham: If Mr. Ayers were allowed to testify to the question which was just propounded to him, and to which an objection was sustained, he would testify that—

Mr. Clark: I object to this.

Trial Examiner: This is an offer of proof.

Mr. Clark: What an adverse witness would testify to?

Trial Examiner: Allowing an offer of proof by an adverse witness is a bit unusual, but he can make the offer of proof. It isn't evidence, and you can't be hurt.

Mr. Clark: All right.

John Ayers—for Respondent—Cross

Trial Examiner: I will allow him to make it to protect his rights. Go ahead.

Mr. Statham: That the new employees were hired—well, I don't want to read over the affidavit first, if we can have five minutes recess to go through the affidavit. I want to be sure to put in the right words.

Trial Examiner: All right.

Mr. Clark: Let's put the whole affidavit in. We don't object to it.

[399] Mr. Raphael: No, sir. May we have a recess?

Trial Examiner: All right, we—

Mr. Clark: I would like the record to show that we made an offer to put the witness' affidavit in.

Trial Examiner: Being a little gunshy of taking a recess while the witness is still on the stand, I will, however, permit it. Let's take five minutes.

(A short recess was taken.)

Trial Examiner: Let the hearing come to order. All right, Mr. Statham.

Mr. Statham: I would like to make that offer of proof by way of question and answer. But, before I do that, I will say that I will make this witness my own witness under 43(b), and ask these questions. Then, after I conclude this line of questioning, I would like to revert back to cross examination.

Trial Examiner: He is an officer of the Respondent?

Mr. Statham: Yes, sir, he is Treasurer, or Secretary and Treasurer.

Trial Examiner: Well, then, your offer of proof can be made. Is there any objection to the witness being questioned under 43(b) as an adverse witness?

Mr. Clark: As I understand it, he is making him his own witness.

John Ayers—for Respondent—Cross

Trial Examiner: Yes, but he can cross-examine him because he is an officer.

[400] Mr. Clark: I object to making him a witness under 43(b) as an adverse witness and asking leading questions, if that is what he intends to do.

Trial Examiner: I believe that is what he is after.

Mr. Clark: I object to making him a witness under 43(b) and then proceeding to ask him leading questions, if that is what he is intending to do.

Mr. Statham: My understanding is—my understanding of that rule is that you can ask an adverse witness leading questions whether it be under 43(b) or any other.

Trial Examiner: Does anybody have the Federal Rules here?

Mr. Clark: I will let him go ahead. Just note my objection.

Trial Examiner: All right. I will rule that under 43(b) the witness is an officer of an adverse party and, therefore, can be treated as an adverse witness automatically, with the right to cross examination. You may make your offer of proof by question and answer. Well, as a matter of fact, if you—

Mr. Statham: I understand that there is an objection, so I am not making an offer of proof under 43(b).

Trial Examiner: You mean you are making him your own witness now?

Mr. Statham: Yes, sir, and this is not by offer of proof.

Trial Examiner: Is there any objection to the General Counsel doing that now, or do you want him to finish with the [401] cross examination of the witness first?

John Ayers—for Respondent—Cross

Mr. Clark: Let him go ahead for the sake of time.

Trial Examiner: All right.

Mr. Clark: But I would like to do this at this time. I would like to make an objection as to asking him and offering any proof that will, in any way, vary from the allegations contained in the Complaint.

Trial Examiner: Well, until the questions are asked, we'll see whether you can object. You may object to individual questions and then I will rule on it.

Mr. Statham: And by going ahead now, I understand that I am not hindering my right to revert back to cross examination after I finish this line of cross examination?

Trial Examiner: That is right, and you have a right to ask leading questions of an adverse witness under 43(b) on cross examination.

Mr. Clark: I think he should be made to state even before offering this proof, if Your Honor please, as to whether the matters that he expects to bring out are afield, are extraneous to the allegations contained in the Complaint, and whether or not he has changed his theory of this entire case, the theory upon which he has prepared this case in chief.

Trial Examiner: I have stated that it seems to me that the questions along this line have indicated he might do so, [402] but I think he is free to change his theory if he wants.

Mr. Clark: We don't think so.

Trial Examiner: You can object.

Mr. Clark: Not unless he amends the Complaint properly and gives us an opportunity to defend in that respect.

John Ayers—for Respondent—Cross

Trial Examiner: Well, if he goes beyond the Complaint, you have a right to object to the question and I will rule on it then. I can't rule in advance, until I hear the question. Proceed, Mr. Statham.

By Mr. Statham:

Q. At what rate of pay did you employ the new employees on June 8, 1961—June 12, 1961? A. It depended upon their skill, sir.

Q. Was that rate of pay lower than the rate of pay which you had been paying the employees whom you discharged? A. Those that had no skills, yes, sir.

Q. Well, those that did have skills? A. The base rate was the same, sir.

Q. Now, what about—

Trial Examiner: If we continue to have noises from the audience, we are going to have to close the hearing to the public. Now, I won't have any more outcries.

By Mr. Statham:

Q. Now, what about the incentive system? Was the incentive system changed so that the average level of incentive earnings decreased? A. The incentive system was left in effect as it was at the [403] time of the strike.

Q. Well, now, the Company has their own ideas about what that was. What I am asking you is what about the earnings, the money the people were taking home and the money the Company was paying out, did it change—did this change? A. The take-home money probably changed some, yes, sir. We made—

Q. Just answer my question about a possible change. It did change?

John Ayers—for Respondent—Cross

Mr. Clark: Let him explain his answer.

Trial Examiner: You are free to explain your answer. Go ahead.

A. (Witness, Continuing) At the time we commenced to rehire on June 12th, naturally we recognized we were going to hire new people with no experience. Consequently, we hired in at the legal minimum rate, which was one dollar an hour, or the base rate for the job which we retained the same as at the time of strike, and according to their skills. Now, the base rate structure was gone over and some slight changes—and some slight revisions were made in a few of the base rates. The average of the base rates remained basically the same. The incentives and standards that were established and were in effect at the time the strike occurred, over 90% of them were left exactly as they were. They were not changed. There were a few changes made in some of the standards which the [404] Company felt were basically and badly out of line. Any adjustment made in the standards was greatly in excess of any possible adjustment that the Company felt might have been made under the contract.

Q. Well, in addition, in the incentive levels, isn't it also true that you eliminated some of the pay of the workers? A. There were some jobs which, under the contract, we had been paying incentive on, and those jobs where the incentive was being paid were not in direct relationship to what the individual was doing, and there was no measurement of his particular skill or his ability or his amount of work done that—

Q. Regardless of your opinion, wasn't— A. It wasn't an opinion. It was a matter of engineering.

Q. Well, all right. Did it have the effect of lowering their pay? A. The incentives were taken away from these particular jobs on which there was no way of measuring incentive pay.

John Ayers—for Respondent—Cross

Q. And isn't it also true that what is commonly referred to as the eight cent per hour adder was discontinued?

A. Yes, the eight cent adder—the eight cent per hour adder was discontinued, sir.

Q. And there were numerous incidents where you revised the incentive so it then became lower, isn't that true?

A. No, sir.

[405] Q. Are you saying there were not numerous instances where the— A. Explain what you mean by numerous, sir.

Q. Any number which was not insignificant. What would numerous mean to you? A. Numerous, to me, would be a great number—a large portion.

Q. Would you express it then? A. I made the statement that over 90% of the incentive rates were left alone. Now, let me say this, too, that the Company, recognizing that in a training program of a new crew of people, there would be considerable cost to the Company of this training program and, consequently, it was necessary to make some adjustment in wages in order to get over this training program. We, in no case, adjusted our wages below—well, actually we just made the adjustment of the eight cent adder. That was the basic adjustment that was made.

Trial Examiner: There is a contention in the pleadings by the Company that they didn't bargain after June 8th.

Mr. Raphael: That's right.

Trial Examiner: I don't know why we have to go into anything that happened after June 8th. You are perfectly free to do it if you want to, Mr. Statham, but I think it is a waste of time. He admits they refused to bargain with the Union in good faith after the 8th. Their defense is this, that they weren't obligated to under the Act at that point.

John Ayers—for Respondent—Cross

[406] Mr. Raphael: That's right.

Trial Examiner: What they did thereafter is admitted. I just don't see the point in going into all of this. I am not stopping you.

By Mr. Statham:

Q. Isn't it true, Mr. Ayers, that between the period of June 12, 1961, and approximately on or about November 25, 1961, that 385 names were entered on the payroll? A. Yes, sir.

Q. And on or about that date—referring to November 30, 1961, there were only approximately 200 employees on the payroll? A. Yes, sir. ,

Q. Now, what was the complement of the work force between the period June 1st to June 8th? A. There was no production work force during June 1st to June 8th.

Q. You had fired them. All right. A. Excuse me, sir. I am talking about the number of people in the plant working, and there was no production force working. Now, you are talking about the people that were in the bargaining unit that were out on strike, is that correct, sir?

Q. Yes, sir, and those who were in the unit but not on strike. A. Right. Let me think just a second there. There were 202 people outside the plant and five or six inside. That would [407] make 207 people, sir, or 208. I misunderstood your question. I'm sorry, sir.

Q. In your Answer, you have got a list of people's names who were not terminated. A. Right, sir.

Q. And a list of names of people who—and a list of people to whom a letter was sent stating that if they did not return to work by a certain time you would discharge them if they were participating in the work stoppage? A. Yes, sir.

Q. In addition to those people and the people whom you discharged—well, of course, you discharged them by that

John Ayers—for Respondent—Cross

day. In addition to those people, how many other people in the Unit were working for you—any? A. At what time, sir?

Q. Who were still considered to be employees between the period of June 8th up until the time you started hiring new employees on June 12th. Were there any other employees? A. Yes, sir.

Q. In the Unit I mean. A. Four watchmen and a maintenance man.

Q. Any others? A. I believe that's all in the Unit.

Q. O.K. Did Fort Smith Chair Company, or anyone on behalf of Fort Smith Chair Company, file a labor—strike that [408] question. Well, I will go ahead and ask it. Did Fort Smith Chair Company, or did anyone on behalf of Fort Smith Chair Company, file a charge with the National Labor Relations Board based upon the work stoppage that was being conducted by the people named in the Complaint between the period—or during any period of time?

Mr. Clark: I object to that question as being immaterial, irrelevant and not within the bounds of the allegations of the Complaint. I think we went all through that with the previous witness.

Mr. Statham: We did.

Trial Examiner: I believe I ruled I would permit it in as part of cross-examination and, therefore, I will direct the witness to answer.

The Witness: No, sir, we did not.

Mr. Statham: I have no further questions.

Trial Examiner: Mr. Youngdahl?

Mr. Clark: Is that the end of your offer of proof?

Mr. Statham: That was cross examination.

Mr. Clark: Where did your offer end? At what point did that stop?

Mr. Youngdahl: There was no offer.

John Ayers—for Respondent—Cross

Trial Examiner: In fact, Mr. Clark, you objected to certain questions, and I wouldn't have allowed an objection if it were just an offer.

[409] Mr. Clark: I got mixed up somewhere. I thought he was making an offer.

Trial Examiner: Are there any further questions of this witness?

Mr. Raphael: Yes, sir.

By Mr. Raphael:

Q. Mr. Ayers, at some point at this May 31st meeting, you did make some statement to the Union Committee about the Company's proposals being your last offer, right?
A. Yes, sir, that was done toward the end of the meeting, sir.

Q. And you restated it, and isn't it true you made a statement that "this is our last offer"? A. The last time we mentioned it, yes.

Q. Well, there isn't any doubt about that, that you said, "this is my last offer"? A. I said that this was the Company's final offer, and to take it to the people and vote on it. In other words, we had reached a point in the discussion where the Company felt that this was the great amount they could come down to on the issues.

Q. And that was done after rather mature consideration, was it not? A. Yes, sir.

Q. And it was true that it was your last offer? [410] A. For that day, yes, sir.

Q. Well, you had considered it—you had considered the incentive plan for some time, had you not, and how it was working? A. Yes, sir.

Q. And, as a matter of fact, Mr. Ayers, for at least a couple of years prior to that negotiation period you and Mr. Bethell both had repeatedly objected to the incentive

John Ayers—for Respondent—Cross

plan in that it was costing you too much money? A. No, sir.

Q. Isn't that right? A. No.

Q. Weren't there a number of grievances during that period? A. Yes, sir.

Q. And didn't you consider that an harrassment of the company? A. Yes, sir—the grievances, yes, sir.

Q. And they were grievances about the subject matter of the incentive plan, weren't they? A. Yes, sir, some of them were.

Q. So just as you told us on cross examination by Mr. Statham, that is the harrassment you were talking about, among other things, the grievances as to the incentive plan?

A. The grievances were the harrassment, not the incentive system.

[411] Q. Well, the harrassment was the grievances, but the incentive system was costing you too much money and you wanted to do away with both, right? A. No, sir, we weren't trying to do away with grievances, nor were we trying to do away with the incentive system. We wanted the grievances handled after Company hours, and no proposal we made, in any way, did away with the incentive system.

Q. Well, Mr. Ayers, do you—strike that. Mr. Ayers, did you see the Union's advertisement published in the local papers during the course of the strike? A. I saw an advertisement which they published, yes.

Q. Did you make any counter-advertisement in the paper? A. No, I did not.

Q. Did you see the various leaflets issued by the Union? A. Yes, I have a copy of one of them right here beside me.

Q. Did you make any counter publicity propaganda statement to the press during that period? A. No, sir, I did not.

John Ayers—for Respondent—Cross

Mr. Clark: I can't see that this is material. I will object to it.

Trial Examiner: Oh, I think he is probably laying a foundation to show inconsistent statements.

By Mr. Raphael:

Q. Now, Mr. Ayers, did you see Mr. Campbell and various Union representatives during the month of June [412] after the Union published statements and issued certain leaflets? A. I saw those gentlemen from time to time, yes, sir.

Q. Did you have any conversation with Mr. Louie Campbell and Mr. Bost, or any of the Union officials, concerning the content of what they published in their leaflets or what was published in the newspapers? A. No, sir.

Q. Right. You didn't say a word to them about it, did you? A. Why should I, sir?

Q. All right. Now we will find out why.

Mr. Raphael: Mr. Examiner, may we have this marked for identification as Intervenor's Exhibit—is it 6 or 7.

Trial Examiner: You went to 5, so the next one is 6. It will be marked Intervenor's Exhibit No. 6.

(Thereupon, the document above-described was marked Intervenor's Exhibit No. 6 for identification.)

By Mr. Raphael:

Q. Now, Mr. Ayers, in this leaflet, which you were good enough to give me, the statement is made—reading from Intervenor's Exhibit 6 for identification, this being a leaflet issued by the Union, quote: "The facts of this strike are very simple. Our contract expired on May 31. Because

John Ayers—for Respondent—Cross

of the Company saying they were losing money, we offered to renew our contract for another year, without any wage increase, so that the Company could improve its financial position." [413] Now, do you remember reading that in the leaflet? A. Yes, sir.

Q. And you didn't say to any of the Union representatives that that statement is false, did you? A. They offered to renew the old contract without any wage increase.

Q. Oh, they did? A. Plus the changes which we had already agreed to.

Q. You didn't make any statement to the press that that statement that I have just read to you in his leaflet was false and untrue?

Mr. Clark: Objection.

Mr. Raphael: I submit, Mr. Examiner, this is of considerable importance on the question of credibility.

Mr. Clark: Is this cross examination that Mr. Raphael is engaged in at the present time pursuant to Mr. Ayers' being made a witness by the Board, or is it cross examination under the direct examination by us?

Trial Examiner: I don't know. It is cross examination, in either event.

Mr. Clark: Well, I object to any further cross examination of this witness in this respect because it was not gone into on direct examination by us.

Mr. Raphael: Oh, Mr. Examiner, I submit—

Trial Examiner: Now, wait a minute. I believe that before [414] the witness was ever made the General Counsel's witness under Rule 43(b) he had already testified on cross examination, in answer to a question by Mr. Statham, that he denied that the Union stated their willingness to renew the old

John Ayers—for Respondent—Cross

contract without the changes, and I think this is proper cross examination.

Mr. Clark: Note my exceptions.

Trial Examiner: You have automatic exceptions.

Mr. Clark: You notice, also, your Honor, that this goes way up into July.

Trial Examiner: But if he made an inconsistent statement in July which indicates—

Mr. Clark: But on my direct examination we didn't go into anything that happened up in July.

Trial Examiner: Well, you may continue.

Mr. Raphael: I would like this marked Intervenor's Exhibit 7, which is a leaflet issued by the Union.

Trial Examiner: No. 7.

(Thereupon, the above-described document was marked Intervenor's Exhibit No. 7 for identification.)

By Mr. Raphael:

Q. Mr. Ayers, I will show you Intervenor's Exhibit No. 7, which is a leaflet issued by the Union, and showing it to you and reading from the third paragraph, as follows: "The facts of this strike are very simple. Many of us have worked for this Company for more than twenty years. [415] We have spent the best years of our lives here and we certainly would not be on strike if we could have avoided it. We offered to renew our contract without a wage increase so that the Company's financial position could be improved during the coming year. Our generous offer was rejected and instead the Company wanted us to agree to a change in the contract language which could have meant hourly wage cuts of 50¢ per hour, or \$20.00 per week for many of our members. Obviously we could not agree to this and so the strike took place."

John Ayers—for Respondent—Cross

Do you remember seeing those leaflets? Did you ever issue any statement to the press or over the radio, or in any other manner, that contradicted the statements I have just read to you from that leaflet? A. No, sir, I didn't see any reason to further justify the Union's propaganda in that manner, sir.

Q. All right.

Mr. Raphael: And may I have this leaflet marked Intervenor's Exhibit—whatever is the next number?

Trial Examiner: Intervenor's 8.

(Thereupon, the above-described document was marked Intervenor's Exhibit 8 for identification.)

By Mr. Raphael:

Q. Now I will show you Intervenor's Exhibit No. 8, and read you the same—being a leaflet issued by the Union—and I will read this statement to you. Well, I will [416] show it to you, Mr. Ayers rather than— A. Yes, it's the same.

Q. It is the same language? A. Yes, sir.

Q. Showing you that statement and asking you the same question, did you ever make a statement in the press to Louie Campbell, Elmer Bost, or any other Union representative, or anybody at all, concerning that statement in the leaflet? A. Sure, I have talked to a lot of people, but not to any Union officials or the press.

Q. And you never issued any statement denying that those statements were not true? A. Mr. Raphael, at this time we had a picket line. We were interested in peace and anything that the Company would have said or published at that time would have done nothing but stir up the kettle again.

Q. All right.

John Ayers—for Respondent—Cross

Mr. Raphael: Mr. Examiner, may we have this marked for identification next in order?

Trial Examiner: No. 9.

Mr. Raphael: And this one, No. 10.

Trial Examiner: Intervenor's 10.

(Thereupon, the above documents were marked Intervenor's Exhibits 9 & 10 for identification.)

Mr. Clark: May I see those, please?

[417] Mr. Raphael: By all means.

Mr. Clark: I object to this since it is the same language as the ones before. Mr. Raphael is just burdening the record with the same repetitious material, and I don't see it is material in any way.

Trial Examiner: Is it necessary to put every single one in if the language is the same?

Mr. Raphael: Oh, no, Mr. Examiner, no. I submit to you that—and I will state this as briefly as I can. If, during the course of negotiations, you could say somehow it is significant to me, a year later, that the Union's offer was not with or without the modifications, but to extend the contract as was—that is retrospective thinking. Now, if, in reality, at the time of those negotiations, the Company thought that that nicety of distinction "with or without" modification was significant, no company would have over a period of time—June, July, August, September, October, November—permitted this stream of assertions "we offer to renew the contract" to be repeated over and over again without sometime saying, "Why, them Union fellows is liars. Here's what we said." And that was the time to say it.

Mr. Clark: Now, I want to make a motion here and an objection. I object to the introduction of the evidence concerning these circulars, and I object to

John Ayers—for Respondent—Cross

any further cross examination of this witness concerning these circulars, because [418] it is plain, in view of Mr. Raphael's admission that he is now offering these for substantive evidence and not for impeachment purposes, and I move that all testimony regarding these matters be stricken.

Trial Examiner: I disagree with your statement that this isn't being used for impeachment. I think it very definitely is.

Mr. Clark: Impeach what?

Trial Examiner: However, I think it is accumulative. It is to impeach the testimony that I have already quoted about four times in the last hour, that in response to a question by Mr. Statham on cross examination, the witness denied the Union ever stated to him, or in his presence, that it was willing to renew the old contract without any changes.

Mr. Clark: All right.

Trial Examiner: This, apparently, is a matter on which these gentlemen are trying to impeach the witness. They are not accepting his testimony on that, and this is part of the impeachment.

Mr. Clark: Why should they be entitled to offer their own self-serving declarations into evidence?

Trial Examiner: I will rule this much, however. Mr. Clark. I think the procedure that Mr. Raphael has used here is highly incorrect. He has been reading into the record [419] certain documents which haven't been offered into evidence and, to the extent he is following an improper procedure, I will sustain your objection. But now as to the circulars, as to whether he has the right to put them in for the purpose of impeachment, I don't agree with you. Now, I am going to strike—well, I won't strike anything now, but I will not permit any further

John Ayers—for Respondent—Cross

reading into the record of any of the documents which haven't been offered.

Mr. Raphael: All right.

Trial Examiner: The motion to strike is overruled.

Mr. Raphael: All right. May I without incurring any objection from anyone, have this marked for identification, which is a newspaper.

Trial Examiner: What number?

Mr. Raphael: It would be No. 11.

Trial Examiner: Intervenor's No. 11.

(Thereupon, the document above-described was marked Intervenor's Exhibit 11 for identification.)

By Mr. Raphael:

Q. I show you a newspaper, which is Intervenor's Exhibit No. 11, dated September 15th, and this is the Fort Smith News, and I refer your attention to page 11, Mr. Syers, containing a photograph and some described material, and I direct your attention to the second paragraph underneath the bold face type, which, to avoid repetition, is the same as the other material that we just talked about—which I just [420] interrogated you about. Did you make any statement to contradict the assertions there which are similar to the assertions in the other leaflets?

Mr. Clark: I object to that question. He is still showing him the picture and the article and it hasn't been introduced into evidence, and he is reading from it.

Trial Examiner: I said he couldn't read into the record any excerpts from a document that hasn't been introduced in evidence. Now, he hasn't done that yet.

John Ayers—for Respondent—Cross

Mr. Clark: He is showing the witness a picture of a document that has not been introduced into evidence, and reading it. It's the same thing. He is getting information off the document.

Trial Examiner: No, it is not the same at all. He hasn't put anything in the record.

Mr. Clark: He made the statement that it shows the same thing as the other documents, so he is getting around it.

Trial Examiner: I will strike that part.

By Mr. Raphael:

Q. Mr. Ayers, have you seen this paper before, which is marked Intervenor's Exhibit 11? A. I believe I saw that ad.

Q. And also the picture on top of it? A. I believe so.

Q. And that contains the language that we have been quoting—that I have been quoting to you from other leaflets concerning [421] the offer of the Union to renew the contract, correct? A. Basically, yes.

Q. And with regard to Exhibit 11, you made no public announcement that it was wrong or in error, or anything else, did you? A. We didn't feel any public announcement was necessary.

Mr. Raphael: Now, Mr. Examiner, I offer into evidence Exhibits 7 through 11, inclusive, for the Intervenor.

Trial Examiner: 7 through 11?

Mr. Raphael: Yes, sir.

Trial Examiner: Is there any objection to the receipt in evidence of Intervenor's Exhibits 7 through 11?

Mr. Clark: I renew my objection to 10 and 11.

John Ayers—for Respondent—Cross

Trial Examiner: They weren't offered until this moment. Do you mean for identification?

Mr. Clark: All right, or even identified.

Mr. Raphael: They have been marked.

Trial Examiner: I don't think 9 and 10 were identified.

By Mr. Raphael:

Q. I show you Intervenor's Exhibits 9 and 10 for identification, and— A. I have never seen any of these.

Q. You haven't seen those? A. No, sir, not on colored paper.

Q. All right.

Trial Examiner: Now, is there any objection to the [422] receipt in evidence of Intervenor's Exhibits 7 through 11?

Mr. Clark: Yes, sir.

Trial Examiner: Which ones?

Mr. Clark: We object to the introduction of Intervenor's 9 and 10.

Trial Examiner: It seems they are not admissible. The witness has said he never saw them before. I am rejecting 9 and 10. Now, 7, 8 and 11, is there any objection to the receipt in evidence of 7, 8 and 11?

Mr. Clark: We have an objection Exhibits 7, 8 and 11 because there has been no testimony as to when these particular exhibits were published, and I think 6 is also in that group.

Trial Examiner: No. 6 wasn't offered. You are correct, Mr. Clark, and I think without some indication of date that those exhibits would have no probative value.

John Ayers—for Respondent—Cross

By Mr. Raphael:

Q. Mr. Ayers, you saw these after the strike, did you not—after the strike started?

Mr. Clark: I object to that. Now, these are his exhibits and—

Trial Examiner: Let me get these exhibits straight. We are talking about 7 and 8.

By Mr. Raphael:

Q. You saw these during the strike, did you not, after June 1st?

Mr. Clark: Now—

[423] Trial Examiner: I will overrule the objection. Answer the question.

The Witness: I saw them when they were presented, sir, which was—the first ones came out on June 21st. It was some time after June 21st.

By Mr. Raphael:

Q. O. K. Will you take a look at Exhibit for identification No. 8 and tell me whether that is the one you are talking about? A. It says it is in the 7th week of the strike, and that would put it in the latter part of July.

Q. All right. Take a look at this one and see if that is the one you saw the latter part of June—referring to Exhibit 7 for identification? A. This is similar to the other one.

Q. This is the one you saw around June, the latter part of June? A. The latter part of July, sir.

Q. Latter part of July. But this one, referring to Exhibit No. 8, talks about the seventh week of the strike? A. So does the other one.

John Ayers—for Respondent—Cross

Q. That was about the time you saw that one, right?

A. The other one says the same thing.

Q. O. K. So they were both issued about the same time, and you saw them around the— A. The latter part of July, yes, sir.

[424] Mr. Raphael: All right, I offer them.

Trial Examiner: Now, which ones are you offering?

Mr. Raphael: 7 and 8.

Trial Examiner: Is there any objection to the receipt in evidence of Intervenor's Exhibits 7 and 8?

Mr. Statham: No, sir.

Mr. Clark: I do have this objection. I think they are immaterial.

Trial Examiner: Are you putting these in for the limited purpose of attempting to impeach the witness?

Mr. Raphael: Yes, sir.

Trial Examiner: If it is limited to that—

Mr. Clark: No objection.

Trial Examiner: Intervenor's Exhibits 7 and 8 are received in evidence.

(Thereupon, the documents heretofore marked Intervenor's Exhibits 7 & 8 for identification were received in evidence.)

Mr. Raphael: I am, Mr. Examiner, putting it in for whatever inferences are permissible from the repetition by the Union of the offer as showing an intrinsic conclusion in assisting you and the Board in arriving at matters of credibility if they find it material.

Trial Examiner: Oh, well, that isn't going to help me on that.

John Ayers—for Respondent—Cross

[425] Mr. Clark: I would object to them on that basis.

Trial Examiner: The Union witnesses?

Mr. Raphael: No, I am not saying that.

Mr. Clark: That's what you just got through saying.

Trial Examiner: That is what I thought you meant. If you introduce it in an attempt to impeach the credibility of the witness now on the stand,—

Mr. Raphael: I do that.

Trial Examiner: —I will accept it.

Mr. Raphael: Yes, sir, but I don't want it limited to that, because I also think it certainly corroborates the credibility of witnesses for the Union, in that if they engaged, or representatives engaged—Union representatives engaged—in a course of conduct subsequent to the time they say they made this statement, and which they repeated the statement over and over again, and which is not denied by Company officials that statement was made, and the probability of its having been made is increased by this document, so that the document is a forked instrument, in that it attacks Mr. Ayers and supports all of the Union's witnesses from top to bottom.

Mr. Clark: I object to it.

Trial Examiner: I will not go along with that statement, I'm sorry.

Mr. Statham: They have already been offered for impeachment, but I do think it has some substantive value other than [426] probative value in impeachment, for this reason. It shows why they were striking. Now, Mr. Clark may say, well, that is self-serving. But I think there are several reasons why that is not absolutely true in this case. To begin with, I think it is *res gestae*. Secondly, I think

John Ayers—for Respondent—Cross

that in may unfair labor practice cases the Board has looked at picket signs and pamphlets, and so forth, to determine the intent of the strike, the purpose of the strike. I think it is a manifestation of intent beyond doubt.

Trial Examiner: It certainly is not *res gestae* seven weeks later.

Mr. Statham: The strike was still continuing.

Trial Examiner: We are concerned with why the strike commenced, not with why it was continuing, and having commenced seven weeks before is not *res gestae*. Now, with regard to any other corroborative value, I find it to have none whatsoever, and the only purpose for which I will admit those two exhibits is for the possible impeachment of the witness.

Mr. Raphael: All right, save my exceptions.

Trial Examiner: You have automatic exceptions.

Mr. Raphael: I'm sorry. I do that out of no disrespect, Mr. Examiner, but it is a habit I have in trying cases sometimes.

Trial Examiner: I know a lot of lawyers have that habit. All right now, 7 and 8 are in for the limited purpose, [427] and 9 and 10 are rejected. Now, No. 11 I haven't ruled on yet. What is the basis of your objection to No. 11?

Mr. Clark: Immaterial.

Trial Examiner: I haven't seen it yet.

Mr. Raphael: It is the same material, your Honor except a little more interest because there is a picture on top.

Mr. Clark: On the basis of your previous ruling, I would have no objection.

John Ayers—for Respondent—Cross

Trial Examiner: I will let it in for the limited purpose of attempting impeachment of the witness on the stand.

(Thereupon, the document heretofore identified as Intervenor's Exhibit No. 11 was received in evidence.)

Mr. Raphael: Then we have Intervenor's No. 6.

Trial Examiner: I don't believe you offered that.

Mr. Raphael: All right, I am offering 6, which was identified by the witness. We offer No. 6 for all purposes.

Mr. Clark: I have no objection if it goes in with the same limitation imposed by the Trial Examiner.

Trial Examiner: I will make the same ruling with regard to Intervenor's Exhibit No. 6. I will allow it in for the limited purpose of any tendency it may have to impeach the witness, and not for any other purpose.

Mr. Statham: Mr. Examiner, I would like to make a request [428] in that regard. I know it is done sometimes. I would like for you to reserve your ruling on that point so that I can argue it in my brief as to why I think these documents just introduced by the Intervenor can have more probative value than on impeachment. I think it is a legal question which could well blend itself to further consideration. I do know it was done by Trial Examiner Bellman in regard to some evidence.

Trial Examiner: I will handle it that way. Although it could be done as you suggest, I will stick by my ruling.

John Ayers—for Respondent—Cross

Mr. Clark: And your ruling is correct, if your Honor please, because this was several weeks after the Charge was filed and is merely self-serving.

(Thereupon, the document heretofore marked Intervenor's Exhibit No. 6 for identification was received in evidence.)

By Mr. Raphael:

Q. Mr. Ayers, you have made a statement, have you not, or some Company official made a statement, sometime in November, I believe, 1961, that you had 385 employees on the payroll. Is that right? A. No, sir.

Q. What was the figure? A. The statement was that between June 12th and that time we had hired 385.

Trial Examiner: That is an indication of turnover.

[429] *By Mr. Raphael:*

Q. That was untrue then? A. That we hired 385, no.

Q. It was the absolute truth, was it? A. It's the absolute truth.

Q. And what was that figure you mentioned to Mr. Statham which was 200 and some? A. He asked how many—approximately how many we had between June 1st and June 8th.

Q. Oh, I see. Perhaps I didn't understand that.

Trial Examiner: There was a turnover from—
Mr. Raphael: Oh, all right. I get it, yes.

By Mr. Raphael:

Q. Mr. Ayers, had you gotten any report back from the people who attended the June 1st meeting at which this

John Ayers—for Respondent—Cross

strike vote was taken? A. Had I gotten any report, back, sir?

Q. Yes. A. I had no direct conversation with anyone that was at that meeting, sir.

Q. You had—did you have an indirect conversation with anyone? A. I probably heard what you might call scuttlebut with regard to what went on at that meeting.

Q. Well, wasn't it reported to you that at that meeting several speakers got up and reported on the negotiations between the Union representatives and yourself, stating that [430] Mr. Ayers had made a proposal and said "take it or leave it"? Didn't you hear that?

Mr. Clark: I object to that; rumor, hearsay, immaterial.

Mr. Raphael: Oh, Mr. Examiner, we have it established that this is not my witness, that I am not asking this witness to report on the hearsay, that I am cross examining the witness and laying a foundation for other questions.

Mr. Clark: He cannot lay a foundation for other questions by hearsay evidence. The matters he is asking this witness now are purely hearsay.

Trial Examiner: Oh, yes.

Mr. Raphael: Mr. Examiner, it is a solid rule that you can lay a foundation on cross examination by anything, not merely hearsay, but symbols, documents—

Trial Examiner: I am going to let it in, even though it is immaterial, because I think it is proper cross examination. This is one way of getting around trying to impeach a witness. Answer the question.

Mr. Raphael: I could, Mr. Examiner, if I chose, whistle "Dixie" to him on cross examination, if that might stimulate something.

John Ayers—for Respondent—Cross

Mr. Clark: That wouldn't be hearsay.

Trial Examiner: All right, I have ruled that he can answer the question.

Mr. Clark: "Dixie" is a reality.

[431] Trial Examiner: Answer the question.

The Witness: I do not recall hearing anyone, or any scuttlebut or any report that meeting that that was said, sir.

By Mr. Raphael:

Q. Now, will you tell us again, Mr. Ayers, what you said at the May 31st meeting just before the meeting termination? A. I said—

Q. In discussing the proposals? A. I said "this is our final offer, take it to the people, and vote on it."

Q. During that discussion on that afternoon, was there any occasion, Mr. Ayers, when you got excited? Just yes or no. A. I don't recall getting overly excited, no, sir.

Q. But you were excited? A. I probably got excited.

Q. And during the course of that excitement, you may have used a little pounding on the table? A. No, sir. When I get mad I kind of clam up inside instead of putting it out.

Q. I see. You became silent in your excitement? A. I wouldn't be surprised, sir.

Q. Well, were you or weren't you? You know what happened? A. Yes, sir.

Q. What happened when you got excited? Did you pound on the table. [432] A. No, sir.

Q. You wouldn't deny that you might have? A. To the best of my knowledge, I did not pound the table.

Q. You have no clear recollection of it? A. No, sir.

Q. Mr. Ayers, it is true, is it not, that during the course of the operations of the plant under the old incentive plan,

John Ayers—for Respondent—Cross

that you found objectionable, as interpreted by Father Brown in any event, and finally came to the conclusion, after reviewing that whole experience with the incentive plan, you had to have some relief—right? A. We needed some relief financially with the Company, not from the incentive plan, sir.

Q. Not from that alone, but all the way around—various other things— isn't that so? A. Yes, sir.

Q. All right. A. The vested rights clause was not a relief clause in any shape or form.

Q. I am not asking you about that. A. All right, sir.

Q. Just what your general picture was when you went into negotiations in May, 1961, and you needed relief bad, did you not? A. Yes, sir.

[433] Q. You had been losing money for how long? A. Four and a half years.

Q. And you were continuing to lose money? A. For four and a half years, that's right.

Q. Right up to May? A. Yes, sir.

Q. You had found the Union reasonable on the money matters in the previous negotiations, had you not—referring to the October negotiations? A. In that we got by with only an increase in insurance cost?

Q. Yes. Would you be willing to characterize the Union's position in that regard as reasonable? A. I guess you would say that was so, sir.

Q. All right. A. With regard to those wages.

Q. That wasn't uncompromising, was it? A. No, that was not.

Q. And in these negotiations the Union said that they still had in mind your financial condition and said to you "we don't want any money." Do you remember that? A. He finally got around to that.

Q. That was reasonable, wasn't it? A. As far as that particular point was concerned, yes, sir.

John Ayers—for Respondent—Cross

Q. That wasn't pushing you over the brink of bankruptcy. [434] A. At that particular point, no, sir.

Mr. Raphael: That's all.

Trial Examiner: Mr. Youngdahl, do you have anything?

Mr. Youngdahl: No, sir, nothing.

Trial Examiner: Redirect?

Mr. Clark: No, sir.

Trial Examiner: Nothing from—nothing further from this witness? (No response) Now, Mr. Ayers, you testified that at one point in the negotiations—I believe this was May 31st—the Union stated to the Company that if the Union would take the old contract, with the changes already made—no, strike that—that the Union asked for two cents across the board and an additional holiday, namely, Christmas Eve, and the changes already agreed upon—right?

The Witness: Yes, sir.

Trial Examiner: And then before the close of the meeting of May 31st the Union dropped the two cents across the board?

The Witness: And the Christmas holiday.

Trial Examiner: And the Christmas holiday?

The Witness: Yes, sir.

Trial Examiner: So, according to you then, at the close of the May 31st meeting, the Union's position was that it wanted the old contract with the changes already agreed upon?

The Witness: Yes, sir.

[435] Trial Examiner: And at the close of that same meeting, the Company's position was that it wanted three specific matters disposed of—vested rights, the grievance procedure after working hours, and the unreported absenteeism?

The Witness: Yes, sir.

John Ayers—for Respondent—Cross

Trial Examiner: Now, in your opinion, did the vested rights position of the Company constitute a request by the Company for a change in the contract?

The Witness: No, sir. In my opinion, it merely was a clarification of the contract—of the incentive system in the contract.

Trial Examiner: In your opinion, was the Company's attempt to get the grievance procedure after working hours an attempt to get a change in the contract?

The Witness: It was a slight change, sir. It was in line with practice at that time, with one minor change, yes.

Trial Examiner: In your opinion, when the Company—

Mr. Clark: Let me object here.

Trial Examiner: Yes, sir.

Mr. Clark: I don't believe you are quoting this witness correctly, as far as the three basic issues.

Trial Examiner: Well, if you will tell me where I am incorrect, I will be glad to correct my question.

Mr. Bethell: You have stated that the Company's final proposal was to have grievance meetings outside Company hours. [436] That was not the Company's final proposal.

Trial Examiner: It wasn't? As I recall it, the Company wanted to limit the number of people.

Mr. Bethell: Yes, sir, that's right.

Trial Examiner: And limit the pay to base?

Mr. Bethell: Yes, that is correct.

Trial Examiner: All right, I will stand corrected. Now, in view of my changing the question, will you answer it?

John Ayers—for Respondent—Cross

The Witness: May I explain my previous answer, sir?

Trial Examiner: Yes, sir, certainly, you may.

The Witness: The customary grievance procedure up to this time had been that the Steward Committee normally did not exceed three. That was not written in the prior contract, but it was not a change of condition.

Trial Examiner: It wasn't a change of condition, but it was a limitation, was it not, that wasn't in the old contract?

The Witness: That is correct, sir. Now, the matter of the base pay provision was a matter of practice that this Company had had for over 20 years, in that we had always paid base pay. In the light of the arbitration decision, the Arbitrator said if a man was on incentive, then since the contract said without loss of pay, he would draw his incentive average while he was there. That was a change in the method over which we had operated under the same clause for 20 years. [437] Consequently, that was not a change because the Chair Company had never been in that position. That was another company. Consequently, the only real change in operation was the limitation of one hour per week.

Trial Examiner: But there is also a limitation in the contract of three men during working hours?

The Witness: That's true, except that prior to this time we had not had more than three in the Chair Company at these grievance meetings; therefore, in all respects, it was not a change.

Trial Examiner: And my next question is was the Company's request for a clause on absenteeism a request for a change in the contract?

John Ayers—for Respondent—Cross

The Witness: That was something that was not in the contract. It was in addition, sir.

Trial Examiner: It was an addition to the old contract?

The Witness: Yes, sir.

Trial Examiner: You were seeking that additional clause?

The Witness: Just the fact that they should report when they are to be absent. It had no teeth in it. It provided no hardship on anyone.

Trial Examiner: That was one of the things the Company was seeking at the close of the May 31st meeting?

The Witness: Yes, sir.

[438] Trial Examiner: I have nothing further. Oh, yes, I do, one other question. You may have answered this. Did I understand you to say that sometime during one of those two meetings, either the May 29th or 31st meeting, that you, on behalf of the Company, stated that the Company desired to abolish the incentive system? Did I understand you to make that statement or did you say that?

The Witness: Well, sir, in regard to that, we were talking about reducing the eight cent adder as one way to actually come up with a reduction in cost to the Company, and something was said about, well, let's throw the incentive system out, and—

Trial Examiner: Something was said by whom?

The Witness: One of the Union stewards made that comment, sir, and I said something to the effect, well, that is one thing we could do to effect a savings, but, frankly, sir, I wasn't serious and—

Mr. Statham: I object to the witness saying he wasn't serious.

Trial Examiner: Are you moving to strike?

John Ayers—for Respondent—Cross

Mr. Statham: I am moving to strike "I wasn't serious," or whatever that was.

Trial Examiner: Well, I think I have got to leave it in. It is part of his answer which was responsive. It was a characterization, but if anybody can characterize—I think [439] if anybody can characterize a statement as being intended or not intended, it's the person who made the statement, so I will leave it in.

Mr. Statham: He should be asked if he laughed when he said it or if—

Trial Examiner: Well, you can go into that. Now, to be sure the record is clear, was your statement at that time that "that is one thing we could do"?

The Witness: I said—I don't remember my exact words on that, sir, but—

Trial Examiner: Well, recall it as best you can.

The Witness: I made a response to him of something, I imagine, somewhere along the line that "if we could get rid of the incentive system, that will probably make quite a change, but I don't think either one of us would be happy under those circumstances." Then we continued—and since we have continued the incentive system under our present operation, I think that would exhibit that we considered it a good part of our operation.

Trial Examiner: That is all part of the statement you made?

The Witness: No, sir.

Trial Examiner: Let's get the record clear. I am trying to get from you, Mr. Ayers, the statement you made to the Union. I don't want you to add to it, but just what you [440] said, period.

The Witness: To the best of my recollection, sir, I replied, in effect, that "yes, we could get rid

John Ayers—for Respondent—Cross

of the incentive system; that would probably be some help, but I don't believe either one of us would be happy with that."

Trial Examiner: All right. I have no further questions.

By Mr. Clark:

Q. Was that a major point of discussion that was pursued?

Mr. Raphael: I object to the witness stating whether it was major or minor or incidental.

Trial Examiner: I think he can state that. Your own witness, when he was on the stand, said, "well, this was only minor and we didn't spend much time on it." I think he can characterize what was major and what was minor. Answer the question.

The Witness: No, sir, it was not.

Trial Examiner: Is there anything further?

Mr. Clark: Nothing further.

Trial Examiner: You are excused, Mr. Ayers thank you.

(Witness excused.)

Trial Examiner: We will take a five-minute recess.

(Short recess was taken.)

Trial Examiner: The hearing will come to order. Call your next witness.

Mr. Clark: Mr. Weeks.

William Glover Weeks—for Respondent—Direct

[441] WILLIAM GLOVER WEEKS, a witness called by and on behalf of the Respondent, having first been duly sworn, was examined and testified as follows:

Direct examination

Trial Examiner: State your name and address.

The Witness: William Glover Weeks, 2220 South Railroad Street, Fort Smith, Arkansas.

By Mr. Clark:

Q. Are you employed by the Fort Smith Chair Company, Mr. Weeks? A. Yes, sir, I am.

Q. Were you working for the Chair Company on May 29th and May 31st, 1961? A. Yes, sir.

Q. How long have you been with the Chair Company? A. Since January of 1930.

Q. 1930? A. Yes, sir.

Q. What position did you hold in 1930 with the Chair Company? A. I went to work as a machine operator, trainee.

Q. What is your present position with the Chair Company? A. Plant Superintendent.

Q. And you have been with the Company continuously since 1930? A. With the exception of about three and a half years during the war, when I was in the Army.

[442] Q. Mr. Weeks, were you present at the negotiation sessions that took place on May 31st and May 29th, 1961, with Local 270? A. Yes, sir, I was.

Q. I will ask you what was the last offer that the Union made to the Company on May 31, 1961? A. The last offer that the Union made was that they would drop their money demands, and together with the proposals that had already been agreed upon would form a new contract.

William Glover Weeks—for Respondent—Cross

Q. And what were those proposals that had already been agreed upon? A. That was the father-in-law and mother-in-law qualification on death, or holiday pay, and the notification of—and the notification in the stipulation of employees, new standards, with the addition being as suggested by the Union, that the method would be explained.

Q. You have been present in the hearing room since the beginning of these proceedings. have you? A. Yes, sir, I have.

Q. Mr. Campbell testified that on May 31st, when the Company gave the Union certain written proposals, that Mr. Ayers told them "that is the Company's last offer, take it or leave it". Did you hear Mr. Ayers make any statement of "take it or leave it"? A. I did not.

[443] Q. Did you see Mr. Ayers pound the table? A. No, sir.

Q. Now, at the time the Company proposals were given to the Union, did Mr. Campbell make any statement concerning whether these would be acceptable by the members of the Union? A. Are you speaking of the final three proposals that the Company made?

Q. The final proposals that the Company made to the Union on May 31st. A. Mr. Campbell said that he would take those proposals to the Union but he would not make any effort to sell these proposals.

Q. Did he make any statement as to what would happen in case they were rejected? A. Yes, he stated that if those proposals were rejected we would start all over on new negotiations, start from scratch, start from the beginning.

Mr. Clark: That's all.

Trial Examiner: Cross examination.

Cross-examination by Mr. Statham:

Q. What is your position with the Company, Mr. Weeks?
A. Plant Superintendent.

William Glover Weeks—for Respondent—Cross

Q. Do you remember what Mr. Campbell's words were when he made this offer which you have testified to? How did he [444] phrase it? Do you remember? A. I am not quite certain of just when you mean.

Trial Examiner: I assume counsel is talking about the Union's last offer on May 31st.

By Mr. Statham:

Q. That is the only one you have testified to, isn't it? You mentioned the Union's final offer? A. Yes, sir.

Q. You understand my question now, don't you? A. I am afraid not.

Q. Do you remember how Mr. Campbell phrased that offer which you have testified to.

Mr. Bethell: Let the record show the hesitation of the witness.

Mr. Bethell: Your Honor, there is nothing wrong with the witness thinking over his answer before he responds to it.

Mr. Raphael: The record doesn't show the hesitation unless it is pointed out by somebody, and I am pointing it out. I am pointing out the long hesitation of this witness to that question.

Trial Examiner: The record will show. Give us your answer, please.

By Mr. Statham:

Q. Are you able to answer the question, Mr. Weeks?

A. If you will just give me a minute, please, sir.

Q. It has been a long time ago, hasn't it? [445] A. It has been quite sometime, yes, sir.

William Glover Weeks—for Respondent—Cross

Q. And you didn't take any notes, did you? A. No, sir, I didn't.

Q. And you weren't really directly involved, not near as much as Mr. Bethell or Mr. Campbell or Mr. Bost or some of these people with you? A. No, sir.

Q. And you probably haven't given this near the consideration as Mr. Campbell and Mr. Bost have, have you? A. Probably not.

Q. Well, there is no doubt about that, is there? A. There might be in my mind.

Q. Well, answer the question. How did Mr. Campbell press his last offer? A. Mr. Campbell stated that he was willing to drop his money proposals, and together with the two agreements that had already been made would form a new contract.

Q. He said two agreements, didn't he? A. The one agreement that had been made by the Company and one that had been made by the Union.

Q. All he mentioned was two, isn't that right? A. Yes, sir, that is correct.

Q. O.K. About what time of day in the afternoon was that made? A. I would say sometime between 4:00 and [446] 5:00 o'clock in the afternoon.

Q. Are you certain it was between 4:00 and 5:00? A. It could have been a little prior to 4:00. It was in that neighborhood.

Q. Had there been a recess taken by the Company before that during the afternoon session? A. There had been numerous recesses taken all during the day.

Q. Do you remember how many recesses were taken during the afternoon? A. As I recall, two.

Q. Two by the Company or what? A. I believe one by the Company and one by the Union.

Q. Were any more recesses taken that afternoon? A. No, sir.

William Glover Weeks—for Respondent—Cross

Q. No more recesses were taken that afternoon?

Mr. Clark: He has answered the question. He's asking him the same question.

Trial Examiner: That is permissible and proper procedure on cross examination.

By Mr. Statham:

Q. Didn't you hear Mr. Bearce make a remark about the Union proposal which you have testified to? A. I don't remember Mr. Bearce making a remark.

Q. Well, are you saying he did not? You have been here throughout the course of the hearing? A. Yes, sir. I don't remember Mr. Bearce making a remark.

[447] Q. You saw Mr. Bearce when he testified in this hearing, didn't you? A. No, sir, I don't remember having seen Mr. Bearce testify.

Q. Have you been here throughout this proceeding? A. Yes, sir.

Q. And you don't remember Mr. Bearce even testifying, do you? Naturally, you don't know what Mr. Bearce testified to then, do you? A. No, sir.

Trial Examiner: Will you answer audibly, please? What did you answer? You testified that you didn't see Mr. Bearce testify here, is that right?

The Witness: Mr. Bearce, no, sir, I didn't see him.

By Mr. Statham:

Q. But you have been here throughout the hearing continuously, have you not? A. Yes, sir.

Q. Have you missed any of the hearing? A. No, sir.

Q. What other Union members on the Negotiating Committee commented on Mr. Campbell's last offer that you

William Glover Weeks—for Respondent—Cross

have testified to? A. What other Union members commented on his last offer?

Q. That's right. A. As I recall, Clyde LaRue made a comment on his last offer.

Q. What was that comment? [448] A. Well, it was on the last offer that was agreed to be taken to the Union and he stated that he would not make any attempt to sell that offer to the people.

Q. Now, maybe you didn't understand my question. What comments did any members of the Negotiating Committee—the Union Negotiating Committee—make on behalf of Mr. Campbell's last offer which you have testified to? A. I don't recall.

Q. Well, do you recall whether they did or did not, or can you say? A. I don't recall that they did.

Q. Do you recall that they did not? I am not trying to trick you. I am just trying to test how much you do remember. A. I would say that they did not.

Q. They did not. None of them did? Is that your answer? A. No, sir, I don't remember.

Q. All right. Now, what did the members of the Company Negotiating Committee say about that last offer of Mr. Campbell's, as you have characterized it? You are hesitating now. Do you remember or not? A. I am trying to remember, yes, sir.

Mr. Raphael: Let the record show the lapse of time that it is taking this witness to answer that question.

Trial Examiner: The record will show.

A. (Witness, continuing) Mr. Ayers stated that it was [449] necessary that the Company should have some concessions in the contract.

Q. Did he say what those concessions would have to be? A. Yes, sir, they were mentioned.

William Glover Weeks—for Respondent—Cross

Q. And did he enumerate those concessions? A. Yes, sir, he mentioned the three concessions and explained the reasons why the Company should have them.

Q. And he told the Negotiating Committee that this was their last offer, and he should—and he would have to take it back to the people? Isn't that right? A. He asked that they take it back to the people.

Q. Do you remember what his words were? Can you testify as to what his exact words were? A. Yes, sir.

Q. Can you testify— A. I am attempting to.

Q. Can you tell what his exact words were? A. John said that those things are necessary and take those proposals to the people and have them vote on it.

Q. Are you saying those are his exact words? A. As I recall it, yes.

Q. O.K.

Mr. Statham: No further questions.

By Mr. Raphael:

Q. Mr. Weeks, have you told us all of what you remember from this May 31st meeting? [450] A. No, sir.

Q. Tell us anything else that comes to your mind that anybody said at that meeting?

Mr. Clark: I object to that. That is not within the scope of direct examination.

Trial Examiner: Oh, I think it is.

Mr. Clark: He can pick out certain matters concerning these meetings that we—

Trial Examiner: On cross-examination he can bring out the entire picture so that I, as a finder of fact, can relate it to an isolated statement made.

Mr. Clark: I don't think it is a proper question to ask him to state everything he remembers.

William Glover Weeks—for Respondent—Cross

Trial Examiner: Why isn't it? Answer the question.

A. (Witness) I recall statements that John Ayers made on the afternoon of the 31st regarding the Company's position with reference to the incentive plan. Mr. Ayers discussed at length the increase in wages that the Fort Smith Chair Company has had since the beginning of the incentive system in the past four years. He went into detail about the increase in the labor percentage and he talked about the loss picture at Fort Smith Chair Company.

Q. Now, during the course of that afternoon session on May 21st—31st, I beg your pardon—

Trial Examiner: Wait a minute. Let's see if the witness [451] has finished his answer. You asked for everything that he could remember. He paused for breath. Let's find out if that is the end of his answer or not.

Mr. Raphael: O.K.

Trial Examiner: Is that the end of your answer, Mr. Weeks, or is there more?

The Witness: No, sir, I will give more of it.

Trial Examiner: All right.

A. (Witness, continuing) I remember at one point during the afternoon when Mr. Campbell came in after a recess. and he asked the Company group if we wanted a contract or if we wanted to have a strike, and he was told by John Ayers and Mr. Bethell that the Company very much wanted a contract, and at that point he stated that he was willing to drop his money demands if the Company would drop their contract proposals. After that, there was another recess. Upon return to the room from the recess,—

William Glover Weeks—for Respondent—Cross

Mr. Raphael: Let the record again show the lapse of time it takes the witness to answer this question.

By Mr. Raphael:

Q. Does that about finish your recollection on that?

Trial Examiner: He is in the middle of a sentence. Give him a chance.

Mr. Raphael: I don't mind. I have been waiting patiently through all these long pauses.

[452] Trial Examiner: All right.

Mr. Raphael: We have been very patient.

Trial Examiner: You asked him for everything he remembers happening at a meeting that lasted many hours, and you have to give him a chance to reply.

Mr. Raphael: I didn't ask him that, Mr. Examiner. I asked him what else he remembered.

Mr. Clark: I think it would show the witness is thinking over his answer.

Trial Examiner: We will give him a chance to think.

Mr. Raphael: All right.

A. (Witness, continuing) I don't recall for sure—well, I will drop that. But at one point, and I am not sure this was immediately after that, the Company group made some modifications in two of their three proposals, in that we would allow three committeemen an hour's time each week on base pay for grievance meetings with whatever witnesses necessary, and that we would limit the requirement for employees notification of absenteeism to a simple statement of when they expected to be absent and when they expected to return. I recall during the May 29th meeting

William Glover Weeks—for Respondent—Cross

that the proceedings for the entire day were pretty well taken up first by—

Mr. Statham: I move to strike this out as not being responsive.

Trial Examiner: The question was limited to May 31st?

[453] Mr. Raphael: Yes, sir.

Trial Examiner: The question was limited to May 31st.

The Witness: I beg your pardon. I'm sorry.

By Mr. Raphael:

Q. Now, you have exhausted your memory as to what took place at the May 31st meeting, is that right, Mr. Weeks? A. No, sir, I have been talking about the afternoon. I can tell you some of the events of the morning.

Q. Well, I mentioned the afternoon, I think, in my question. Does that finish your recollection of the afternoon? A. Well, yes, sir.

Q. All right. Now, Mr. Weeks, you have been employed by this Company how long? A. Since 1930.

Q. And in what capacity? A. Various capacities.

Q. What is your capacity at this time? A. Plant Superintendent.

Q. Are you related to any of the officials in the corporation? A. No, sir.

Q. Have you discussed this case with anybody? A. Yes, sir, we have discussed.

Q. Recently? A. Yes, sir.

Q. Just before you went on the stand? [454] A. We have discussed it all during the day and for the last few days, yes, sir.

William Glover Weeks—for Respondent—Cross

Q. Didn't you just discuss it out there in the hall? A. We have continued to discuss it right up to this point.

Q. All right. Now, at the meeting on May 31st, Mr. Weeks, did Mr. Ayers get excited or emotional at any point? Do you recall that? A. He may have become emotional. I don't remember him being excited.

Q. You say he was emotional but not excited. What was the emotion that you observed him to have? A. As I recall it, he was bothered and he put his head down between his knees for a moment, and his elbows on his knees.

Q. Do you remember him getting excited toward the end of the discussion about the three proposals that he made, saying to Louie "take it to the people; we've got to have it"? A. I remember him making a statement to take the proposals to the people.

Q. Did he pound the table at that point? A. No, sir.

Mr. Raphael: That's all.

Mr. Statham: I have a few more questions.

By Mr. Statham:

Q. Mr. Weeks, I didn't understand—now, when you said Mr. Ayers was bothered and he was emotional, at [455] what point did he stick his head down between his knees? A. As I recall, Mr. Campbell had been needling

John Ayers and—

Q. You say Mr. Campbell was needling Mr. Ayers. Give us the words, and not characterize—

Trial Examiner: Wait a minute. He was asked whether Mr. Ayers appeared to be emotional. That is a characterization, and this man can testify in that

William Glover Weeks—for Respondent—Cross

manner, because sometimes you have to use such words to describe.

Mr. Statham: Well, I wanted to know what Mr. Campbell said. He says he was needling him and I would like to know what he means by that.

Trial Examiner: All right, you can certainly ask him to explain it.

By Mr. Statham:

Q. What do you mean when you say Mr. Campbell was needling him? A. Mr. Campbell was insisting that the Company drop their three requests or demands that the Company said they needed, and he kept discussing it with John to the point that he got probably a little bit perturbed.

Q. Is that at the point where he stuck his head between his knees? A. Yes, sir.

Q. How long did he— A. I think that was the only display he made during the [456] afternoon.

Q. How long did he leave his head between his knees? A. Just for a moment.

Q. Had you ever seen Mr. Ayers do this before? A. Yes, I have seen him do those things.

Mr. Statham: No further questions.

Trial Examiner: Any redirect?

Mr. Clark: No redirect.

Trial Examiner: Mr. Weeks, during the afternoon of May 31, did you hear Mr. Ayers use the word "relief"?

The Witness: Well—

Trial Examiner: In connection with the testimony that you gave that he discussed with the Union the incentive system?

The Witness: Well, I don't know that he used exactly that word or not.

William Glover Weeks—for Respondent—Cross

Trial Examiner: Did he use words like "the Company needs"? I think you testified he used the words "those things are necessary"?

The Witness: Yes, sir, I did.

Trial Examiner: Well, that's all. You don't remember the word "relief"?

The Witness: No, sir, I don't.

Mr. Raphael: I have another question.

By Mr. Raphael:

Q. Mr. Weeks, you said, in reporting what you remembered about the May 31st meeting, that Mr. Ayers said [457] "we've got to have these concessions", referring to the Company's proposals. Do you recall saying that? A. Yes, sir.

Q. And that is what Mr. Ayers said? A. I am not for sure those are the exact words, but that these were necessary for the good of the Company and that he wanted those things in the contract.

Q. And when you refer to "those things", you mean the three proposals were necessary as concessions and things that the Company needed because of its financial condition—correct? A. Yes, sir.

Q. And the three things were what? A. They—

Q. Weren't they the absenteeism clause, mother-in-law clause, and change in the incentive system? A. No, no, not the mother-in-law clause.

Q. What was it? A. It was the—

Q. The incentive was the important one? A. Yes, the incentive—the vested rights clause.

Q. Yes. A. And the grievance meetings as finally agreed on, with the time allowed for three men at regular pay, and the absenteeism clause. Those are the three things.

Tommy Condren—for Respondent—Direct

Q. O. K. [458] A. The mother-in-law clause had already been agreed on by both the Company and the Union.

Q. All right, that's all.

Trial Examiner: Anything further of this witness?

Mr. Clark: Nothing further.

Trial Examiner: Thank you very much, Mr. Weeks. You are excused.

(Witness excused.)

Mr. Clark: Call Mr. Condren.

TOMMY CONDREN, a witness called by and on behalf of the Respondent, having first been duly sworn, was examined and testified as follows:

Direct examination:

Trial Examiner: State your name and address.

The Witness: Tommy Condren, 1503 North 49th, Fort Smith, Arkansas.

By Mr. Clark:

Q. By whom are you employed? A. Fort Smith Chair Company.

Q. How long have you been with the Chair Company?

A. Since 1947, with the exception of the time I was in the Service in 1952 to 1954.

Q. What is your position with the Chair Company?

A. Sales Manager with the Company.

Q. Are you—were you present at the May 29th and May 31st negotiating sessions which took place between the Chair [459] Company and Local 270? A. Yes, I was.

Tommy Condren—for Respondent—Direct

Q. I will ask you, Mr. Condren, what was the last offer that the Union made to the Company at that meeting on May 31st? A. The last offer on the evening of May 31st from the Union was that they would drop their money demands if the Company would drop their contract proposals for another year's contract with the changes that had been agreed upon previously on the 29th and the morning of the 31st negotiations.

Q. Mr. Condren, I will ask you this question. Mr. Campbell testified that when the Company came up with its final proposal on May 31st, that Mr. Ayers made the statement that "this is the Company's last offer, take it or leave it". Do you remember Mr. Ayers using the language "take it or leave it"? A. He did not.

Q. Do you remember him pounding the table? A. He did not.

Q. Mr. Campbell—did Mr. Campbell, during any of these negotiating sessions, ever offer to take the old contract and extend it for another year with or without the changes? A. He did not.

Q. Did Mr. Campbell make any statement concerning whether he would recommend the Company's proposals? A. As the proposals were read, after having been asked to write them in longhand, which was done by Mr. John Ayers, and [460] then given to Mr. Campbell, Mr. Campbell said "I cannot recommend these to the members of my Union, or to the people".

Q. Did he make any statement if they were rejected what would happen? A. Yes, he did. He said "if the Union rejects the proposals that the Company has proposed, we will start all over on negotiations."

Mr. Clark: That's all.

Trial Examiner: Cross-examination.

*Tommy Condren—for Respondent—Cross**Cross-examination by Mr. Statham:*

Q. Now, did you ever hear Mr. Campbell say during this May 31st meeting, or any of the other meetings—were you at the June 7th meeting? A. Pardon me, sir?

Q. Were you at the June 7th meeting? A. No, sir, I—pardon me, the June 7th meeting?

Q. Yes. A. Yes, I was.

Q. Did you ever hear Mr. Campbell say that he would agree to extend the existing contract for another year, drop the money demands, and either the contract to be extended either with or without the modifications? A. He did not.

Q. Did Mr. Ayers get emotional during the afternoon of May 31st? [461] A. Not to my knowledge.

Q. Did you see—did he seem to get bothered? A. Not any more than during any other negotiations.

Q. Well, does he normally get bothered during those meetings? A. Tell me what you think “bothered” means.

Q. Well, in your opinion, did he seem bothered? A. No, sir.

Q. Did you observe Mr. Ayers do anything which you could consider to be an act of emotion? A. I did not.

Q. Did you see Mr. Ayers put his head between his knees? A. No, sir.

Q. Did you hear Mr. Campbell in the concluding part of the May 31st afternoon meeting do what has been characterized as needling, or repeatedly asking or begging—strike the word “begging”—repeatedly asking Mr. Ayers and Mr. Bethell to drop their proposals? A. There was a discussion going on all the time that afternoon, sir.

Q. And isn't it true that Mr. Campbell repeatedly asked Mr. Ayers and Mr. Bethell, and all the members of the Negotiating Committee, to drop their demand—drop their proposals which they were making? A. Mr. Campbell asked the Company to consider what had been [462] agreed upon

Tommy Condren—for Respondent—Cross

for another year's contract with the money demands being dropped for another year.

Q. Well, I don't know the answer is responsive. Did Mr. Campbell repeatedly ask the Company Negotiating Committee to drop their proposals? A. Did he repeatedly ask them?

Q. Yes. A. Well, that is a matter of negotiating.

Q. Well, is your answer yes then? A. Well—

Q. Did he or did he not, regardless of whether it was a matter of negotiating, in your opinion? A. Yes, he asked—

Q. Thank you. What was Mr. Ayers answer in regard to those requests? A. To Mr. Campbell's request?

Q. Yes, sir. A. Well, what time in the afternoon are you speaking of, in the—do you mean the last final proposal?

Q. Yes, sir, the last final proposal of the Company. A. Mr. Ayers stated that these are proposals that the Company feels that the contract—pardon me—Mr. Ayers stated that these are the proposals which the Company feels should be in the contract, and to take these proposals to the Union—excuse me—and let the people vote upon them. Now, those [463] aren't his exact words, but that is a summary of the discussion.

Q. How many times did Mr. Ayers say that—I mean, as you say, words to that effect? A. I can't answer that, sir.

Q. Was it more than one time? A. Yes, sir.

Q. Was it more than four times? A. I could not put a limit on that, sir.

Q. Would it be— A. I don't think it was any more than four.

Q. Was it as many as four? A. That, I can't say truthfully.

Q. What did the Company say during that meeting in regard to—let me first ask you this question. Was there a discussion during this meeting of the vested rights clause

Tommy Condren—for Respondent—Cross

in regard to the incentive pay? Do you know what I am referring to? A. The evening of the 31st?

Q. Yes, sir. A. Yes, there was by both parties.

Q. Now, what was the Company's position on that clause? A. Mr. Examiner, may I make this comment, that this really is not in the field of my responsibility to the Company, and I am not fully aware of all the ramifications of it, in that [464] my responsibility is in sales.

Trial Examiner: Well, I gathered that from your title of Sales Manager, but I think you can answer the question to the best of your recollection of what occurred at the meeting because you were called into this meeting.

By Mr. Statham:

Q. Can you answer the question? A. What was the question?

Q. What the Company said in regard to that clause, the vested rights clause. A. Well, to the best of my recollection of this particular vested rights clause, the Company contended that they had this right anyway in the contract and it was merely a clarification of what was in the contract, but due to a previous ruling by Father Brown—I forget his title—that they felt this should be clarified in the existing or in the new contract that was being negotiated at this time.

Q. Who made that statement? A. Mr. John Ayers or Ed Bethell.

Q. They both made the statement? A. At various times in the afternoon, yes, sir.

Q. And what did the Union say about that clause? A. They opposed it.

Q. What did they say? A. That, I don't remember word for word.

Tommy Condren—for Respondent—Cross

Q. Well, do you know who said anything about it?
[465] A. Yes, Mr. Campbell did most of the talking.

Q. What did he say about it? A. I can't remember the words he used, but he opposed it.

Q. Did he say "I opposed it"? A. No, he elaborated on it, but I don't remember the exact words.

Q. Do you remember in substance what he said? A. No, sir.

Q. Did Mr. Bearce say anything about it? A. I don't recall Mr. Bearce saying anything in particular about that.

Q. Do you remember Mr. Bearce being here today? A. Pardon me, sir?

Q. Do you remember Mr. Bearce being here to testify here in this proceeding? A. No, sir, I was gone yesterday afternoon from approximately 5:00 o'clock, and Mr. Bearce testified after I left, I understand.

Q. Do you remember any of the other members of the Union Negotiating Committee making any comments in regard to this clause of vested rights? A. No, sir, I can't truthfully say I do.

Q. And you are testifying, to the best of your recollection, that Mr. Campbell never said, during the May 31, 1961, meeting, anything to the effect that the Union would drop their wage [466] demands, agree to extend the existing contract for another year's time, with or without the agreements already reached? A. He did not say that, sir. He said part of what you said, but not the entire statement.

Q. All right, tell us what he said. A. He stated everything you said, but did not say "with or without the agreements already reached". He did not use that in his statement.

Q. Did you take any notes during this meeting? A. I did not.

Q. And yet there is no doubt in your mind that Mr. Campbell couldn't have said that? A. Yes, sir, that is correct.

Tommy Condren—for Respondent—Cross

Q. And you are Sales Manager of this Company, and normally, of course, your area of operation is in the marketing of their products. Isn't that correct? A. Yes, sir.

Q. Do you have any labor relations functions other than sitting in on negotiating committee sessions? A. None whatsoever.

Q. How have you gone about refreshing your memory as to what occurred during that May 31st meeting? A. Why, naturally, by recollection, studying.

Q. Studying what? A. In your own mind.

[467] Q. Have you studied anything other than just mulling it over in your own mind? A. Oh, let me see.

Q. Answer the question yes or no. You can, can't you? A. Well, yes.

Q. What did you study? A. Oh, some summaries, I guess would be the terms.

Q. I see, and those summaries were prepared by you, of course? A. Pardon me, sir?

Q. Were those summaries prepared by you? A. No, sir.

Q. Who prepared those summaries, do you know? A. I do not know, sir.

Q. Who gave you the summaries? A. John Ayers.

Q. I see, and he gave those to you when? A. Oh, sometime within the last week, I would say.

Q. While you were preparing for the hearing, you mean? A. I do not know that, now. I don't know that because I am not in all the meetings.

Q. You prepared some for the hearing, haven't you? A. Pardon me, sir?

Q. You prepared some for the hearing, haven't you? A. Myself?

[468] Q. Yes, sir. A. None.

Q. You haven't prepared any for the hearing? A. I do not understand your statement—your question.

Tommy Condren—for Respondent—Cross

Trial Examiner: You know, I think perhaps he doesn't know what you mean by the word "hearing". I think that is what is confusing.

By Mr. Statham:

Q. Do you understand the word "hearing", what I mean by that? A. Yes, sir, this hearing.

Trial Examiner: This hearing here?

The Witness: Yes, sir.

Trial Examiner: Not the negotiating sessions.

The Witness: Yes, that's right.

Trial Examiner: You have that clear then?

The Witness: Yes, sir.

Trial Examiner: All right, I guess I was wrong.

By Mr. Statham:

Q. There isn't any doubt in your mind when I was asking you about this hearing that I was talking about this hearing right here, is there? There wasn't any doubt in your mind, was there? A. No, sir. I knew you were talking about this hearing.

Q. This hearing right here? A. Yes, sir.

Trial Examiner: I guess I was mistaken.

[469] Mr. Bethell: I think he misunderstood about the preparation for this hearing. He thought you were—

Mr. Statham: I don't believe—

Mr. Bethell: Let me finish, please, sir.

Mr. Statham: I don't want you to give your opinion on what he was thinking.

Trial Examiner: All right, gentlemen, one at a time, or I'll call a recess.

Mr. Bethell: I'm sorry—pardon me, sir.

Trial Examiner: All right, proceed.

Tommy Condren—for Respondent—Cross

By Mr. Statham:

Q. What did you think I meant when I asked you in regard to preparation for the hearing? You say that you didn't understand my question. A. Well, I assumed, by preparation, that you meant I was spending considerable time with various people concerned with this, and I have not done this.

Q. Well, have you spent any time? A. Not necessarily, no, sir. I have already said my responsibility is for sales so—

Q. O. K., let me get it this way. When did Mr. Ayers give you the summary? A. Sometime within the last week.

Q. Can you pinpoint it any more than that? You say within the last week, do you mean by that within the last seven days? A. Yes.

[470] Q. Did he give it to you at the plant? A. I believe that is correct.

Q. Was there anyone else present when he gave it to you? A. I can't remember.

Q. Did he—what did he tell you this summary was? A. I can't remember the exact words.

Q. Well, all right, you can't testify to his exact words, but in substance what did he tell you it was? This was only seven days ago. A. I believe the comment was made that it had been considerable time since I had appeared—or since we had been in the meeting with the Union. As I said, I am with sales and since this meeting my mind has been off the subject throughout this period of time. And the comment was made that it might be best if I try to refresh my memory with that.

Q. Did he ask you if your memory was refreshed before he gave it to you? A. Beg your pardon, sir?

Q. Did he ask you if your memory was refreshed before he gave it to you? A. He asked me if I remembered basi-

Tommy Condren—for Respondent—Cross

cally what was gone into and I said, yes, I did, but that this might be helpful.

Q. Might be helpful, sure. And what was this summary? Was it a summary of what occurred during the meeting? A. That is correct, sir.

[471] Q. How many typed pages did the document include? A. I do not know, sir.

Q. Well, did you read it? A. Pardon me, sir?

Q. Did you read it? A. Yes, but I don't remember how many pages.

Q. Was it more than three pages? A. Well—

Q. Or five? A. I imagine between three and five.

Q. Do you have that document with you? A. No, sir.

Q. Where is that document? A. I suppose it is at the plant.

Q. Was a summary also given to Mr. Weeks? A. That, I do not know.

Q. What were you told to do with the summary? A. I believe I have already answered that question.

Trial Examiner: Answer it again.

The Witness: Pardon me. I stated before, sir, that I said that it had been approximately a year since I had been in on these negotiating sessions with the Union.

By Mr. Statham:

Q. What did you do with the summary? A. Pardon me, sir?

Q. What did you do with the summary after you got the [472] summary? A. Well, naturally I read it.

Q. O. K. Now, did you then have any meetings with Mr. Bethell and Mr. Ayers and Mr. Clark, or any of those people? A. Yes, sir.

Q. How many meetings? A. Oh, probably two.

Tommy Condren—for Respondent—Cross

Q. Three? A. I don't recall exactly.

Q. I see. And did they talk about what they were going to ask you about at the hearing? A. Not necessarily.

Q. Well, I mean did they ask you—did they tell you what they were going to ask you? A. No, sir.

Q. Did they tell you what the issues were in this hearing? A. Well, that has been evident. I didn't have to be told that.

Q. Was it evident to you last week? A. Pardon me, sir?

Q. It was evident to you before the hearing started?

A. Of what the issues were?

Q. Yes. A. Yes, certainly.

Q. All right, tell us what the issues are. I would like to [473] know myself. A. Well, I don't know that I will cover it word for word, or article for article. And I will say again that this is not my field of responsibility, but, as I understand it, the Company is being charged with unfair labor practice, and basically that is what I know.

Q. That is all you know about the issues? A. Yes, sir.

Q. Did they explain to you in more detail what the issues—what some of the important facts are? A. Not necessarily, no.

Q. I don't understand the "not necessarily". It seems to me they did or they did not. Could you clarify your answer?

Mr. Clark: Mr. Examiner, he is badgering the witness, and I want to object to any further testimony along this line.

Trial Examiner: Oh, I don't believe it has reached that point, Mr. Clark. He is asking him to explain his answer. I will let it go in.

Mr. Clark: And I want to object further on the ground that none of this was gone into on direct examination.

Tommy Condren—for Respondent—Cross

Trial Examiner: Oh, this is a question of how he was prepared to testify. That is perfectly proper. Overrule the objection. Answer the question, please.

The Witness: May I have the question again, please?

[474] Trial Examiner: Will the Reporter read the question?

(Question was read.)

Trial Examiner: All right, after hearing the question, will you answer it, please?

The Witness: I'm sorry. Will you ask the question again?

Trial Examiner: Do you want it repeated or do you want the question rephrased? Mr. Statham, will you reframe it?

Mr. Statham: I will reframe it.

Mr. Clark: I don't think he is even interested enough in the answer to even pay attention to what is going on.

Mr. Statham: Mr. Clark, I don't appreciate your comments.

Trial Examiner: Let's not have—I know it's late, but let's not have any of that. It's late in the day and we are all tired, I know.

Mr. Statham: I will rephrase the question.

Trial Examiner: All right.

By Mr. Statham:

Q. During the time that you have met with the Company officials, which you have testified to, did they explain to you what the material facts were that were involved in this case? A. I would say yes.

Q. And what material facts did they explain to you? A. Oh, I can't give it to you word for word. This was a general summary—general discussion.

Tommy Condren—for Respondent—Cross

Q. You mean they gave you an oral summary, too?

[475] A. General discussion.

Q. I see. Who was present during those discussions?

A. I believe the ones you see in the courtroom now.

Q. Mr. Christy, was he present? A. Yes, I believe that is right.

Q. He has been here during this hearing, hasn't he?

A. Off and on.

Q. Who is Mr. Christy? A. Plant Manager.

Q. What is Mr. Weeks' title? A. Plant Superintendent.

Q. And what about Mr. Martin, was he present? A. Pardon me, sir?

Q. Was Mr. Martin present? A. Yes.

Q. And who is Mr. Martin? A. He is the Personnel Manager.

Q. And he has been here during the hearing? A. Off and on.

Q. And what about Mr. Gene Spearman, was he present? A. No, sir.

Q. Has he been here during the hearing? A. No, sir.

Q. Where is he now? A. I assume he is home now.

[476] Q. I mean he is still working for the Company? A. Oh, yes—excuse me.

Q. For the Fort Smith Chair Company? A. Yes, sir.

Q. Was Mr. Bethell present? A. Pardon me, sir?

Q. Was Mr. Bethell present? A. Yes, sir.

Q. Mr. Ayers? A. Yes, sir.

Q. Mr. Clark? A. Yes.

Q. How many of those meetings did you have? A. I believe I said I couldn't tell the exact amount, somewhere between three and five.

Q. That has all been during the last week? A. Yes, sir.

Q. You don't remember if it was three meetings, four meetings, or five meetings? A. No, sir, I don't remember the exact amount.

Q. All right, sir.

Tommy Condren—for Respondent—Redirect

Mr. Statham: No further questions.

Redirect examination by Mr. Clark:

Q. Do you remember, Mr. Condren, how many times I have been in Fort Smith the past couple of weeks, that [477] you have seen me? A. I believe two times.

Q. And we had meetings both of those times? A. Yes, sir.

Q. And this is one of them—this trip to town is one of them? A. Yes, sir.

Q. And these have been in whose office? A. Mr. Bethell's office.

Q. This hearing, of course, started on Wednesday morning.

Mr. Statham: I object to the leading question.

Trial Examiner: Let's hear the question first.

By Mr. Clark:

Q. Did you go to Mr. Bethell's office on Tuesday? A. I—

Q. The day before this hearing started?

Trial Examiner: Do you object to that as leading?

Mr. Statham: No.

Trial Examiner: Answer the question.

The Witness: I went in the afternoon.

By Mr. Clark:

Q. Approximately what time? A. Around 3:30, I believe.

Q. What time did you leave to go home? A. I think approximately—oh, ten to 4:00 or 4:00 o'clock, something like that—along that time.

Tommy Condren—for Respondent—Recross

Q. Was that the session you referred to that these matters [478] were reviewed generally? A. Yes, it is.

Q. Did we have any other sessions like that? A. None at all.

Q. What time did you leave the courtroom yesterday afternoon, Mr. Condren? A. Five o'clock or shortly thereafter.

Q. Did Mr. Weeks go with you? A. Yes, he did.

Q. You said you didn't hear Mr. Bears testify?

Mr. Statham: I object again—well, no, excuse me.

The Witness: I didn't hear him testify.

Mr. Clark: That's all.

Trial Examiner: Any further—

Mr. Clark: Excuse me, one other question.

By Mr. Clark:

Q. You didn't hear Mr. Bearce testify because you weren't here? A. That is correct, I was not here.

Trial Examiner: All right, anything further?

By Mr. Clark:

Q. One more question. Did anybody tell you what to say when you got upon the stand? A. No, sir.

Mr. Clark: That's all.

Recross examination by Mr. Raphael:

Q. Mr. Condren, you testified in your [479] direct examination—I mean you said on cross-examination by Counsel for the General Counsel something to the effect that

Tommy Condren—for Respondent—Recross

“this is not my responsibility,” referring to labor relations of the company, is that right? A. That is right.

Q. Your mind is not particularly directed to this field?

A. That is correct.

Q. Nor to that problem in this plant? A. Well, everything—I can’t say it is not a problem, but it is not my responsibility to make those decisions, shall I say, and naturally—

Q. So you weren’t particularly interested in what went on there? A. Yes, I would say I was interested.

Q. Did you make notes? A. No, I did not.

Q. Do you remember—withdraw. You say you were interested and you maintained that interest throughout the whole time of your employment, is that correct? A. I beg your pardon?

Q. You maintained this interest in the labor relations throughout the whole of your employment with the Company, did you not? A. Well, I don’t really understand the question.

Q. What is it you don’t understand? [480] A. Well, I will say before I can sell furniture, I have to have it produced.

Q. That’s right, and, therefore, you have to know what the labor relations are, how much— A. Well, not to the extent, sir, that it becomes information that I must retain in my mind.

Q. But you do pay pretty close attention to labor relations in the plant? A. No, I wouldn’t say I pay real close attention to every detail, shall I say.

Q. But, in substance, you pay some attention? A. Certainly.

Q. A good deal of it? A. No.

Q. Did you testify on cross-examination by the General Counsel that your mind is off the subject of the labor relations? A. My responsibility is in the field of sales and distribution.

Tommy Condren—for Respondent—Recross

Q. And you also said that your mind was off that subject when Mr. Statham asked you that question? A. Now—

Q. That question about the May 21st meeting. A. Now, I—

Q. Do you remember saying that? [481] A. The May 31st meeting, I believe it was.

Q. But you did say your mind was off that subject? A. Well, may I have the question again?

Q. I withdraw it. Don't bother. Was your mind off the subject while you were sitting in the May 31st meeting? A. No, sir.

Q. You were listening pretty close? A. Yes, sir.

Q. But you don't remember anything that the Union fellows said, do you, except that one thing that Louie Campbell said—right? A. I testified that they did not state—if that's the question.

Q. Well, I didn't ask you what they did not state. What was it you supposed I was asking you that they did not say, or that you were saying that they did not say?

Trial Examiner: Let's not get this so complicated.

Mr. Raphael: That's all.

Trial Examiner: Are you withdrawing your last question?

Mr. Raphael: Yes.

Trial Examiner: All right. Mr. Condren, with reference to the meeting of May 31st, do you recall Mr. Ayers using the word "concessions" during that meeting, in speaking of the three concessions the Company wanted in the contract?

The Witness: I do not recall that, sir. I recall—I believe that the word I recall would be "some help".

[482] Trial Examiner: That it would be some help?

The Witness: Yes, sir.

Trial Examiner: Do you recall if he used the word "necessary"?

The Witness: No, sir.

Colloquy of Trial Examiner and Counsel

Trial Examiner: Do you recall the word "relief"?

The Witness: No, sir.

Trial Examiner: I have nothing further. Is there anything further from this witness?

Mr. Clark: No, sir.

Trial Examiner: Thank you very much. You are excused.

(Witness excused.)

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record. We will recess for dinner until 8:00 p.m.

(Thereupon, at 6:45 o'clock p.m., a recess was taken until 8:00 o'clock p.m. of the same day.)

[483] EVENING SESSION—8:00 p.m.

Trial Examiner: The hearing will come to order.

Mr. Clark: The respondent rests.

Trial Examiner: Any rebuttal?

Mr. Statham: There are several matters I would like to take care of. One, the parties have no mutually substituted the Exhibits A and B copies of General Counsel's Exhibit 2.

Trial Examiner: You say that has already been taken care of?

Mr. Statham: Yes, sir, but I would like to propose a stipulation that although neither Exhibit A or Exhibit B, attached to General Counsel's Exhibit 2, although they don't have any signatures—although they aren't signed—I would like to have a stipulation that the documents, the originals of these documents, were signed.

Mr. Clark: I don't think it is necessary.

Mr. Bethell: We will stipulate that they were signed, but I believe, too, it is superfluous.

Colloquy of Trial Examiner and Counsel

Mr. Statham: Well, the stipulation is in, so that's that.

Trial Examiner: All right, fine. Thank you, gentlemen. Could I see the documents, the substituted documents? I haven't seen them yet. Exhibit A is the one that the witnesses have been referring to throughout the hearing and—referring to as the Stipulation?

Mr. Clark: Yes, sir.

[484] Trial Examiner: Is that right?

Mr. Statham: Yes, sir.

Trial Examiner: All right, proceed.

Mr. Statham: At this time, the General Counsel has no rebuttal and he rests and, of course, he does have a motion to make before the record is closed.

Trial Examiner: Anything from the Charging Party?

Mr. Youngdahl: No, sir, nothing further.

Trial Examiner: Anything from the Intervenor?

Mr. Raphael: We have nothing further, but we should like to dispose of that which is undisposed of regarding these exhibits, as to which there is only an original but no copies. I refer specifically to Intervenor's Exhibit 1, which is the Company proposals in handwriting, and the various leaflets or pamphlets, Intervenor's Exhibits 8, 7 and 6, as to which there are no copies. As I understand it, Intervenor's Exhibit 11, which is the newspaper, there is a copy, in conforming with the rules and that presents no problem. So that we have only the question of Exhibit 1, and I am referring to Intervenor's Exhibit 1, and also 6, 7 and 8, as to which there are no duplicates. Now, I would assume you can waive the necessity for producing the exhibits?

Trial Examiner: Yes, I can. Is that your motion?

Mr. Raphael: Yes, sir, that is my motion.

Trial Examiner: Is there any objection to the motion?

[485] Mr. Clark: We object to it, in this respect, that as to the documents that have been admitted into evidence, we think we are entitled to a copy because we don't have a copy.

Colloquy of Trial Examiner and Counsel

Trial Examiner: Well—

Mr. Clark: They came out of our files, most of them, in the first place, the ones that have been rejected.

Mr. Raphael: Well, Mr. Examiner, I am referring only to those that were admitted up to this point.

Trial Examiner: The ones that have been rejected, I am not even requiring a copy, since they are rejected. Well, I will deny the motion then and instead I will grant the Intervenor permission to withdraw the original from the custody of the Official Reporter temporarily and return it within five days, together with a photostatic copy.

Mr. Raphael: All right.

Trial Examiner: And maybe other parties would like a copy.

Mr. Raphael: Oh, of course, we will furnish them copies.

Mr. Clark: Return the original to us would be fine.

Mr. Raphael: Yes, I think that is only fair under the circumstances. May I say on the record that I have just handed the documents to Mr. Youngdahl and he has been kind enough to agree to take care of the duplicates of the exhibits, so everything will be clear.

[486] Mr. Youngdahl: To whom are they to be sent—to the Reporter?

Trial Examiner: You will return the original and a copy to the Reporter within five days after the close of the hearing, Mr. Youngdahl.

Mr. Raphael: Now, in connection with Intervenor's Exhibit No. 5, we move to substitute two copies. We move to substitute copies for the originals introduced in evidence. I am referring to Intervenor's Exhibit 5, the letter from Father Leo Brown, dated July 15, 1961.

Trial Examiner: Are the copies legible?

Mr. Raphael: Reasonably so, yes.

Trial Examiner: Any objection?

Mr. Clark: No objection.

Colloquy of Trial Examiner and Counsel

Mr. Youngdahl: No, sir.

Mr. Raphael: And the same motion with regard to Exhibits 3 and 4.

Mr. Clark: No objection.

Trial Examiner: In the absence of objections, those motions are granted, providing that the copies are legible.

Mr. Raphael: Now, we make the same motion with regard to Intervenor's Exhibit 2, which is Father Brown's decision in the Ball-man Cummings case regarding incentive wages.

Trial Examiner: Any objection?

Mr. Clark: No objection.

[487] Trial Examiner: Do you have copies of all the exhibits here in the room?

Mr. Raphael: Yes, they are in the room.

Trial Examiner: And have you furnished them to the Reporter?

Mr. Raphael: Yes, she has been furnished with those.

Trial Examiner: Fine, and she now has them?

Mr. Raphael: Yes, sir.

Trial Examiner: All right.

Mr. Raphael: All right, that concludes the motions with regard to Intervenor's exhibits.

Trial Examiner: May I call the Respondent's attention to the fact that Respondent's Exhibit No. 1 has neither been offered nor withdrawn. What is your pleasure on that, Mr. Clark, offer or withdraw it?

Mr. Clark: We will withdraw that.

Trial Examiner: Withdraw it, very well, the record will show that Respondent's Exhibit No. 1 is withdrawn and should be returned to your custody, if it has not already been done.

(Thereupon, the document heretofore marked Respondent's Exhibit No. 1 for identification was withdrawn.)

Colloquy of Trial Examiner and Counsel

Mr. Clark: It has been returned to me and I have delivered it back to the original owner.

Trial Examiner: All right, fine. Do all—I believe all [488] parties have rested and I think we have all the exhibits straightened out. Now, are there some motions?

Mr. Statham: Yes, sir. The Counsel for the General Counsel moves that the Complaint, as amended, be further amended to conform to the evidence presented in this case.

Mr. Clark: We object, sir, to such a motion.

Trial Examiner: A rather sweeping motion, isn't it? I don't even know whether that means that you are now changing your theory and that I can find a violation because it was bad faith bargaining the 29th of May, or just exactly what the motion means.

Mr. Statham: I am making it as broad as possible.

Trial Examiner: I gather you are. I am going to deny the motion unless you care to limit it.

Mr. Statham: Well, I make a more limited motion then if you are overruling that.

Trial Examiner: I am.

Mr. Statham: At this time, Counsel for the General Counsel moves that the Complaint, as amended, be further amended to conform to the evidence, and that this motion is made solely in regard to minor variations, such as dates, names—such minor variations as those.

Trial Examiner: Is there any objection to the motion?

Mr. Clark: Yes, sir, there is. We don't know what he means by dates and names and various other—

[489] Mr. Statham: Well, it's the usual motion—the customary motion.

Mr. Raphael: Yes, that is usually done.

Trial Examiner: Yes, but sometimes it is very difficult when you have to interpret what it means. I will grant the limitation as to the spelling of names and to dates within, say, a 24-hour or so period.

Mr. Clark: Oh, well, yes, sure.

Colloquy of Trial Examiner and Counsel

Mr. Statham: That is, in general, what it means.

Trial Examiner: That is what it generally means, and that is what it is limited to.

Mr. Clark: All right, no objection.

Trial Examiner: With that understanding, I take it there is no objection?

Mr. Clark: No objection.

Trial Examiner: The motion is granted to that extent. Is there anything further—any further motions? (No response)

Now, gentlemen, I am ready for oral argument. And if you gentlemen want to argue orally, I would like very briefly to outline to you my procedure on oral argument. I am not going to put a time limit on you. I am going to give the General Counsel the right to open and close, since he has the burden of proof. I will not allow any replies or rebuttals after each side has had one chance to argue, except the General Counsel has the right to rebuttal, that's all. I frequently [490] interrupt oral argument to ask questions. In connection with the questions, I want to give you gentlemen two cautions. First, don't jump at any conclusions that I have already made up my mind, because my questions seem to indicate that, because all I am trying to do is indicate to you what is bothering me. I am asking for the benefit of your help on your theory on something that bothers me. Second, don't feel compelled to answer the question on the spur of the moment if you are not prepared to answer. I am not trying to trap anybody. If you don't have a ready answer for it and you want to reserve that for your brief, that will be all right. I don't like it, however, where an attorney says "I will answer that in my brief" and then forgets to do it. That sometimes does happen. But I don't want anybody to feel that he must answer the questions on the spur of the moment when I ask him a

Colloquy of Trial Examiner and Counsel

question because then he may regret it later and may want to change it later.

With that understanding, are you ready for oral argument?

Mr. Statham: Well, sir, due to the fact that there are, I think, some complex and perhaps novel legal issues inherent in the issues in this case, and inasmuch as I think the evidence has been somewhat lengthy and complicated—and I am referring to some lengthy documents—and since I think this is the type of hearing which an oral argument at the conclusion of the hearing could hardly be done with any adequacy, [491] I think a brief would be far more proper in a case such as this and, if it is all right with all the parties, why, I suggest—

Trial Examiner: What you want to do doesn't affect the others.

Mr. Clark: We are in accord with Mr. Statham's feelings.

Trial Examiner: You can do whatever you want, gentlemen.

Mr. Youngdahl: We have agreed previously to no oral argument.

Trial Examiner: You say you previously agreed—

Mr. Youngdahl: Not to have any oral argument.

Trial Examiner: Mr. Raphael, do you want to argue?

Mr. Raphael: I prefer to go along with my colleagues. I am prepared, ready, willing and able and, as a matter of fact, there are so many enticing problems in this case that I think it might be—given a more feasible hour and a fresher spirit to attack the problem—it might be a rather interesting time to have oral argument and I would enjoy the questions from the bench, or from opposing counsel, because I think that this is that kind of a case, where it just isn't two sides of a coin but a kaleidoscope of potential theories and attitudes and analyses that really set your head spinning. But, since the hour is late, I believe I prefer

Colloquy of Trial Examiner and Counsel

to let my head spin from exhaustion rather than from the analyses of legal theories at the moment.

[492] Trial Examiner: I can't get anybody to argue orally. I do have several questions and several points I want to throw out to you. I take it, then, you are all going to file briefs. Now, Mr. Statham, you mentioned J. C. Penny. I gather that was an 8(b) case?

Mr. Statham: Yes.

Trial Examiner: If you will furnish that citation in the brief, it would be sufficient. And the same goes for the Supreme Court decision in Maestro Plastics, which is, so far as I know, the only Supreme Court decision—no, there's another one, Lion Oil I would appreciate the citation in that case from Mr. Raphael, since he raised the case. And any of you gentlemen that want to go into the implications of those decisions, particularly the Supreme Court decision—

Mr. Statham: I can give you that citation now in the J. C. Penny decisions, if you would like it. It is Retail Clerks International Association 34 LRRM 1420, 109 NLRB 111.

Trial Examiner: That was 109?

Mr. Statham: Yes, sir, a 1954 Board decision.

Trial Examiner: Thank you. And you say that is the only 8(b)(3) case you know of?

Mr. Statham: No, there are more, and I will cite others in my brief.

Trial Examiner: I take it your theory is that an 8(b) (3) case was involved there and that the principles would be the [493] same in an 8(a) case? Is that right?

Mr. Statham: I don't know whether I follow you or not, sir.

Trial Examiner: Well, that is one point you can raise. As I see it, the 8(a) (5) always stands or falls on the 8(a) (3) because, if the discharges were proper, the Union lost its majority and, if the discharges were not proper, then the

Colloquy of Trial Examiner and Counsel

Union still retained its majority. Any comment on that in the briefs will be appreciated, if you disagree.

Mr. Raphael: I disagree, and will comment.

Trial Examiner: My mind isn't made up. I am throwing these out for you to give me an answer. Then I also see a problem here with regard to whether or not the strike was protected, and that is whether the failure of the Mediation Service to receive notice had the automatic legal effect under Section 8(d), causing the employees engaged in the strike to suffer a "loss of status".

Mr. Raphael: I take it that is the Company's position, that it so did, is that right?

Trial Examiner: I would assume so. In that connection, there are two—at least two—subsidiary problems that I see. The first is this, that reading the termination clause of the contract which was in existence on May 1, 1961, was the Union, at that point, under a legal duty to issue notice? Now, as I read the Act, the duty is on the party desiring to terminate or [494] modify. Was the Union the party desiring to terminate or modify, back on May 1st, and, in that connection—

Mr. Bethell: Did you say May 1st?

Trial Examiner: Well, about May 1st, 30 days before the strike commenced. Isn't it a 30-day notice that is required before—

Mr. Bethell: The Mediation Notice.

Trial Examiner: Yes, sir, so I am saying May 1st. I may be wrong a day or two, but I think you understand what I am driving at. In that connection, does this termination clause provide that this contract would have expired automatically under its own terms on May 31st if nobody had taken any steps to try to breathe new life into it, or was it a contract which was automatically renewable from year to year unless some party took steps to terminate it? Which was it? I have read the termination clause and I think it is a question. It may very well be that this contract was

Colloquy of Trial Examiner and Counsel

a contract which provided that it expired on May 31, 1961, if it was that kind of a contract. Can it be said that any party was seeking to terminate it, or did it terminate under its own terms and not by the action of any party? Then, of course, coming up to May 31st, another issue, and one which has been litigated very thoroughly, and I am sure all are aware of the issue—or may be an issue at least—and that is whether the purpose of the strike was to terminate or modify the existing [495] contract. There may be other issues, but these are the ones I am particularly asking you to address yourselves to in your briefs.

All right, are there any questions on anything I have said as to what I am talking about? I have given you what I think some of the issues are. Have I made myself clear on what some of the issues are?

Mr. Raphael: I consider you made yourself perfectly clear, sir.

Trial Examiner: All right. Now, it may be I am way off, I don't know, but that is just what is currently going through my mind and if, upon further analysis of the record and the briefs, I see it in a different light, that may very well be. That is the purpose of the briefs. Maybe you can convince me I am wrong, If I think these are the issues and you think they aren't.

Now, am I faced with the request for permission to file briefs?

Mr. Statham: Yes, sir.

Mr. Clark: Yes, sir.

Trial Examiner: All right: How much time do you gentlemen want?

Mr. Statham: I would like to find out from the Reporter when we may expect the record.

(Discussion off the record.)

[496] Trial Examiner: All right, that would be about the 7th of March. Now, what about a date for filing the briefs?

Colloquy of Trial Examiner and Counsel

Mr. Clark: How about 30 to 40 days?

Trial Examiner: The maximum I can give you is 35. Now, I tell you, I am not inclined to give quite that much, unless there is a very good reason for it. I will give all the parties—

Mr. Clark: Are these simultaneous briefs?

Trial Examiner: That's right, no reply briefs. You file them simultaneously. I will give all parties until the close of business on March 23rd to get their briefs into—

Mr. Raphael: How many days is that?

Trial Examiner: About 29 days, something like that.

Mr. Bethell: May I suggest that we have a postmark date as the deadline, sir?

Trial Examiner: No, the Board's rules are when a date is set, that is the date when it must be received in Washington. There are decisions to that effect. There are also decisions to protect you, however. If you put it in the mail on a date which normally would have reached Washington in time, and there is a delay in the mails, you are not accountable for that. In other words, if I set it at the close of business on the 23rd—

Mr. Clark: What day of the week is that?

[497] Trial Examiner: That is a Friday. That is the end of the week. Would you prefer to have the following Monday?

Mr. Clark: Let's have it the following Monday.

Trial Examiner: All right, that is the 26th. I will give all parties until the close of business on the 26th of March to have those briefs to me in Washington, and the briefs should be addressed to me in care of the Chief Trial Examiner at the National Labor Relations Board, Washington 25, D. C. Briefs may be printed, mimeographed, or typed, and I should get three copies. However, if they are typed, I want the three top copies. If any of the parties feel that they have to have, or have to request, an extension

Colloquy of Trial Examiner and Counsel

beyond the time which I have set, that is, March 26th, the party requesting an extension should address that request to the Chief Trial Examiner, National Labor Relations Board, Washington, D. C., and that must reach the Chief Trial Examiner at least three days in advance of the date when the briefs are due, and copies of the motion must simultaneously be served on all other parties.

I might also add that when you send the three copies of the brief to me that it should be accompanied by a simple statement of service. I don't require an affidavit and don't require return receipt, but I do require a statement of counsel, over counsel's signature.

Mr. Clark: Let me ask you this. Is it sufficient to put [498] a certificate at the end of the brief saying—

Trial Examiner: Oh, yes, you can include it in the brief or you can put it in a separate letter, a cover letter. I don't care where you put it as long as your signature appears under it and you sign your name to the effect that service has been made.

Are there any other questions then on briefs and how to go about asking for an extension if you need it? (No response.)

Now, the procedure to be followed before the Board—no, let me start a little farther back. In due course, I will prepare and file with the Board an Intermediate Report and I will have copies served upon each of the parties. Now, upon the filing of my Intermediate Report, the Board will enter an order referring the case to itself and will serve copies of that Order upon all parties. At this point, my official connection with the case ceases. The procedure to be followed before the Board, from that point forward, with respect to filing of exceptions to the Intermediate Report, the filing of supporting briefs, the request for oral argument before the Board, and related matters, is set

Colloquy of Trial Examiner and Counsel

forth in the Board's Rules and Regulations, Series 8, particularly Section 10446 and the following sections.

There being nothing further—well, before I close the hearing, I would like to make one very brief statement, and [499] that is I appreciate the cooperation of all counsel in keeping this hearing moving and in behaving throughout as gentlemen, and I thank you for it.

There being nothing further to come before me, I now declare the hearing closed.

(Thereupon, at 8:45 o'clock p. m., the hearing was closed.)

General Counsel's Exhibit 1 (A)

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

Case No.—26-CA-1094

Date Filed—June 20, 1961

1. Employer Against Whom Charge is Brought—Name of Employer—Fort Smith Chair Company.

Number of Workers Employed—about 200.

Address of Establishment (Street and number, city, zone, and State)—North 3rd and J Street Fort Smith, Ark.

Type of Establishment (Factory, mine, wholesaler, etc.)—factory.

Identify principal product or service—chairs.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)—On or about December 20, 1960, and at all times since said date, it, by its officers, agents and representatives, refused to bargain collectively with United Furniture Workers of America, AFL-CIO, Local 270, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

On or about June 8, 1961, it, by its officers, agents and representatives, terminated the employment of all of its employees in the bargaining unit represented by the said

General Counsel's Exhibit 1(A)

labor organization because of their protected concerted activities or because of their membership and activities in behalf of a labor organization, and at all times since said date has refused and does now refuse to employ the above-described employees.

By the acts set forth in the paragraphs above, and by other acts and conduct, it, by its officers, agents and representatives, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act.

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number)—Local 270, United Furniture Workers of America, AFL-CIO.

4. Address (Street and number, city, zone, and State)—923½ Garrison, Ave., Fort Smith, Arkansas.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)—United Furniture Workers of America, AFL-CIO.

6. Address of National or International, if any (Street and number, city, zone, and State)—700 Broadway, New York 3, New York.

7. Declaration—I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By JAMES E. YOUNGDAHL
James E. Youngdahl, Attorney
1330 Tower Building
Little Rock, Arkansas
(Title, if any)

(Date)—June 19, 1961

General Counsel's Exhibit 1(F)

Re'd 1/9/62 12:30 p.m. GC

John J. A. Reynolds, Jr., Director
NLRB—Memphis

Re Fort Smith Chair Company, 26-CA-1094. Answer to complaint mailed January 8 omitted some details. Request leave to substitute more complete answer dispatched this date.

EDGAR E. BETHELL, Attorney

General Counsel's Exhibit 1(H)

(ORDER RESCHEDULING HEARING)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 26-CA-1094

[SAME TITLE]

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from February 20, 1962, at 10:00 a.m. (CST), in the U. S. District Courtroom, Federal Building, Fort Smith, Arkansas, to February 21, 1962, at 10:00 a.m. (CST), in the Chancery Courtroom, Sebastian County Courthouse, Fort Smith, Arkansas.

Dated at Memphis, Tennessee, this 12th day of February, 1962.

(Signed) JOHN J. A. REYNOLDS, JR.
John J. A. Reynolds, Jr.,
Regional Director, Region 26,
National Labor Relations Board.

General Counsel's Exhibit 2

(STIPULATION)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 26-CA-1094

FORT SMITH CHAIR COMPANY

and

LOCAL 270, UNITED FURNITURE WORKERS OF
AMERICA, AFL-CIO

It is hereby stipulated and agreed by and between Fort Smith Chair Company (herein called Respondent); Local 270, United Furniture Workers of America, AFL-CIO (herein called Local 270); and the General Counsel of the National Labor Relations Board that:

1.

Respondent and Local 270 have had bargaining relations since approximately 1940. From the inception of this bargaining relationship, contract negotiations were conducted by an employer's group called the Furniture Association, of which Respondent was a member. In the contracts resulting from such negotiations, each company comprising the Furniture Association was a named party, and each signed the Agreement. As a result of contract negotiations in 1957, two of the companies, Respondent and Ballman-Cummings Furniture Company jointly entered into a

General Counsel's Exhibit 2

separate supplementary agreement with Local 270 described as a "Stipulation Governing Job Evaluation, Job Classifications and Incentive System," a copy of which is attached hereto and marked "Exhibit A." In 1958, Local 270 and the Furniture Association, which included Respondent, executed a two-year contract having an effective date of October 14, 1958, and an expiration date of October 14, 1960, a copy of which is attached hereto and marked "Exhibit B."

2.

Prior to October 14, 1960, the existing contract between Local 270 and Respondent (Exhibit B) was reopened by Local 270 in accordance with the notice requirements of Section 8(d) of the National Labor Relations Act, as amended.

3.

Thereafter a contract was agreed upon between Respondent and Local 270 having an expiration date of May 31, 1961.

4.

By letter dated March 27, 1961, copy of which is attached hereto and marked "Exhibit C", Local 270 notified Respondent of its intention to terminate the existing contract between the parties and to negotiate a new agreement.

5.

Local 270 and Respondent had negotiating meetings on May 29 and May 31, 1961, without an agreement being reached.

6.

On June 1, 1961, certain employees of the Chair Company went on strike which continued until December 14, 1961.

General Counsel's Exhibit 2

7.

Respondent discharged the persons named in paragraph 11 of the amended complaint on the dates set opposite their names in said paragraph of complaint by reason of their participation in the strike referred to in paragraph 6 above.

8.

On June 1, 1961, and continuing to date, Local 270 has been the representative for the purposes of collective bargaining of the persons named in paragraph 11 of the amended complaint.

9.

Prior to the commencement of the strike described above in paragraph 6, the Federal Mediation and Conciliation Service offices in St. Louis, Missouri and Little Rock, Arkansas, and the Arkansas Department of Labor did not receive notices from Local 270 that a dispute existed between Respondent and Local 270 in regard to the contract which expired on May 31, 1961.

Signed at Ft. Smith, Ark., February 15, 1962.

FORT SMITH CHAIR COMPANY
W. S. Clark
W. S. CLARK
MEHAFFEY, SMITH & WILLIAMS
Boyle Building
Little Rock, Arkansas

Signed at Ft. Smith, Arkansas, February 15, 1962.

LOCAL 270, UNITED FURNITURE
WORKERS OF AMERICA, AFL-CIO
James E. Youngdahl
JAMES E. YOUNGDAHL
1330 Tower Building
Little Rock, Arkansas

General Counsel's Exhibit 2

Signed at Ft. Smith, Arkansas, February 16, 1962.

William E. Statham

WILLIAM E. STATHAM

Counsel for the General Counsel

National Labor Relations Board

722 Falls Building

Memphis 3, Tennessee

(EXHIBIT A)

STIPULATION GOVERNING JOB EVALUATION, JOB CLASSIFICATION AND INCENTIVE SYSTEM FOR BALLMAN-CUMMINGS FURNITURE COMPANY AND FORT SMITH CHAIR COMPANY

It is agreed by and between Ballman-Cummings Furniture Company and Fort Smith Chair Company, parties of the first part, and United Furniture Workers of America, A.F. of L.-C.I.O., and its agent, Local No. 270 of the United Furniture Workers of America, A.F. of L.-C.I.O., parties of the second part, that the following provisions and the exhibits thereto supplement and shall be deemed part of the General Contract between second parties and Fort Smith Chair Company, Fort Smith Table Company, Border Queen, Inc., Ballman-Cummings Furniture Company and Garrison Furniture Company, insofar as the same applies to first parties.

General Provisions

1. Job evaluation, classification and the point plan is covered in Exhibit A for Ballman-Cummings Furniture Company, and in Exhibit B for Fort Smith Chair Company. The method of evaluating jobs is described in Serge A. Birn, Job Evaluation Manual.

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2. The evaluation of all present jobs and of new jobs shall be made in accordance with the job evaluation method, classifications, and points as set forth in Exhibit A for Ballman-Cummings Furniture Company, and as set forth in Exhibit B for Fort Smith Chair Company.

3. The base rate for all present and new operations shall be set in accordance with the schedule of base rates as set forth in Exhibit C for Ballman-Cummings Furniture Company, and as set forth in Exhibit D for Fort Smith Chair Company.

4. The evaluation of any new or changed jobs shall be subject to negotiation, and to grievance and arbitration procedures.

5. The relationship of base rates to points is shown in Exhibit C for Ballman-Cummings Furniture Company and in Exhibit D for Fort Smith Chair Company.

6. Employees on incentive operations will be paid base rate plus twenty per cent on sample and pilot runs when there is no standard set.

7. New employees hired in Grade 1 jobs will be paid \$1.00 per hour until the end of the probationary period, after which they shall be increased to the base rate for the job. New employees hired in other grades will be paid ten cents per hour below the base rate for the job until the end of the probationary period, after which they shall be increased to the base rate for the job. If the job is subject to incentive earnings, on any day when the employee achieves the standard production on the job, he will receive the base rate for the job, plus any bonus earned for that day.

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8. An employee whose present hourly rate of pay is higher than the evaluated job rate shall not have his present rate of pay reduced. If such an employee works on an incentive job, and his red circle rate is five cents or more above the base rate for the job, his incentive earnings shall be computed on the base rate for the job, plus one-half of the difference between that rate and his red circle rate. It is understood that red circle rates shall at no time be deemed to affect the evaluated base rate for the job.

9. Base rates will be effective October 15, 1957. Standards and incentives will be placed in operation as readily as practical commencing the week of October 15, 1957. The Company agrees that packing, yard work and car loading at Fort Smith Chair Company will be placed on standard by December 15, 1958.

I. CONDITIONS OF THE STANDARD

A. *The Standard*

1. There shall be only one standard for any given job. That shall be the one that has been properly authorized on the official Incentive Calculation Sheet, and filed with the Industrial Engineer and the Union. Additional copies will be made available in accordance with operation needs.

2. The standard time includes an adjustment of ten per cent for normal fatigue and unavoidable delays.

3. In order to provide incentive possibilities to those operations, or portions of operations, which are machine controlled, an adjustment of all machine time will be included in the standard. This adjustment will be twenty per cent of the machine time. When the job standard requires the machine operator to set up his own machine,

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the time for that function will be included in the standard. When the set up is to be performed by another employee, the standard for the machine operator will so state. If a machine must be shut down for adjustment or maintenance for more than five minutes, the operator shall be paid on his base rate until the machine is again ready for operation, or until he is transferred to other duties.

B. Inspection, Safety, Health, Quality

1. The standard will be set to permit safety, health, and quality standards to be met. Where inspection time is an essential operation, it shall be described in detail and clearly defined in the standard.

II. ADMINISTRATION

A. Standards—Opportunity to Earn Extra Compensation

1. The Ballman-Cummings Furniture Company-Fort Smith Chair Company incentive plan represents an opportunity to earn extra compensation in addition to the base wage rate set by job evaluation for those employees or groups of employees whose work is covered by standards, and who wish to work above normal. The incentive plan is designed to make full use of these individual characteristics to increase his daily earnings. For example, in any group of people there are differences in dexterity, coordination, mental alertness, temperament, physical condition, etc. Consequently, if this plan operates in a normal way, it is not likely that bonus earnings of different individuals or groups will be the same. The standards will be established at a level which will afford the opportunity to earn a bonus of from twenty to twenty-five per cent on the average for incentive effort.

2. An employee shall understand that his company record from a standards point of view is satisfactory when

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his work output and quality is normal. His work will be deemed unsatisfactory when his work output or quality is consistently sub-normal.

3. An employee's work output is sub-standard when the actual time he spends on a given job is more than the allowed time in the standard for that job. An employee whose work is consistently sub-standard on his assigned job shall be relieved from that classification, but he will not be discharged if he can be re-assigned to a classification which he is able to perform on standard, or to other work which he is able to do with normal efficiency. Such re-assignments will be made with the assistance and approval of the Union. Every effort will be made to find suitable work for such employees. When an employee's work is deemed consistently sub-standard, the department steward and the Chief Steward will be notified. A representative of the Union will have five (5) working days after such notice to observe the performance of the employee, and to consult the records and data which formed the basis of the Company's contention.

B. Request for Application of Standards

1. Request for application of standards to departmental operations will be presented to the departmental supervisor. These should be prepared on a form approved by the plant superintendent and sent to the Industrial Engineer.

2. The Incentive Plan as described throughout this Stipulation shall remain in effect for the duration of the Labor Agreement between the Company and the Union. However, it is understood that from time to time particular jobs or operations may be temporarily suspended from the program when experience shows that re-study is necessary,

General Counsel's Exhibit 2

or when methods, equipment, processes, products or materials are changed.

A job or operation on which a standard has been set shall not be suspended from standard for more than five (5) working days. Standards on new jobs or operations shall be established within ten (10) working days of the time the operation commences. If not reinstated or established within the times stated, the employee's incentive compensation shall be computed retroactive to the end of the stated period.

When temporary conditions cause a change in the standards for a job or operation of less than five per cent, the job or operation shall remain on standard, and the standard will not be adjusted, provided, that no employee will be required or permitted to work in excess of a total of eight hours on such varied standard without adjustment. If the variation continues more than eight hours, the standard for the job or operation will be revised, and the compensation of the employees affected will be recomputed back to the beginning of work on the varied standard.

3. Exhibit E, for Ballman-Cummings Furniture Company, and Exhibit E for Fort Smith Chair Company, respectively, list two groups of jobs. Group 1 is a list of jobs which at this time are not expected to be on an incentive basis, but which may be added to the incentive program by negotiation at any time if found practical. Group 2 is a list of jobs to which the regular incentive plan cannot be applied, but for which a bonus compensation arrangement will be developed, generally upon the basis that employees in these classifications will receive as a bonus an amount equal to the average incentive compensation earned by the department or operation to which work in the classification is most closely related or dependent.

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4. It is agreed that the work of the yard crew in unloading lumber will be paid on an incentive basis. However, the provisions of Article VII, Section 1, of the General Agreement dealing with rates of pay for employees transferred to other work while work is available on their regular jobs, shall not be construed to mean that members of the yard crew are entitled to incentive pay while assigned to other duties when lumber is available for unloading. It is agreed that only members of the yard crew will be used to unload lumber, and that if only part of the crew is needed for this work, the senior members of the crew will be assigned to the unloading work.

5. When the Union requests a re-study of a standard, the employee affected shall be entitled to compensation at the rate established by a revised standard not later than the tenth day worked after written request for re-study is made. If the standard is not revised by the company, but is thereafter adjusted through the grievance procedure, the employee affected shall have his pay computed on the adjusted standard effect with the tenth day worked after the written request for re-study was made. Employees shall in all cases give a standard a fair trial before requesting re-study.

C. Effective Date of Standards

1. A standard will become effective when authorized by the signatures of the departmental supervisor, the Industrial Engineer, and the Plant Superintendent, and a copy furnished to the Union.

2. In all cases new and revised standards will be discussed with the employee before they are applied.

*General Counsel's Exhibit 2**D. Request for Review of Standards*

1. Any employee not satisfied with the standard may in writing on forms furnished by the company request a further study through his supervisor, or through the Union. In the event that this further study is still unsatisfactory to the employee, the matter shall be reviewed by the Plant Superintendent. If still the employee is not satisfied with the rate the matter will be subject to arbitration in accordance with the contract.

*III. CALCULATIONS OF BONUS EARNINGS**A. Base Wage Rates*

1. Company base wage rates are determined by written job descriptions and job evaluation. Bonus compensation will in no way have any effect upon wage rate for different classes of work. An employee who is working on standard is guaranteed to receive not less than his base hourly rate times the number of hours worked. When an employee's regular duties include working in more than one classification, he will receive for all hours worked at his regular duties no less than the base rate for the highest classification in which he regularly works. When working in his other regular classifications he shall be entitled to the rate for the job on which he is working, plus incentives earned, if any, or the base rate for his highest classification, whichever is greater.

B. Bonus Earnings

1. Bonus earnings are always paid in direct proportion to the amount work output exceeds normal. This applies to all work covered by standards which is done by employees

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either as individuals or groups. For example, an employee working alone whose work output is ten per cent above normal as shown by the standard for his work shall receive ten per cent more than his base pay.

2. In group applications and in some machine paced operations, it is necessary to include special allowances to compensate an employee for very small periods of time when he cannot be engaged in productive work.

3. All of the extra compensation which an employee or group has earned as a result of better than normal output shall go to that employee or group.

4. In order for an employee to earn bonus on any job, the work must have been:

A. Assigned to the employee by his foreman.

B. Of useable quality.

C. Done in accordance with the safety provisions prescribed by the standard. (An employee who regards the safety precautions in the standard as inadequate may process his demand for higher safety standards through the grievance procedure.)

D. Accomplished by following the method described in the standard.

C. Basis for Bonus Calculation

1. All job tickets or production reports must be turned in at the end of each day. Bonus shall be computed on a daily basis. Failure to produce a full standard day's work in one day will not affect the bonus for any other day.

*General Counsel's Exhibit 2**D. Individual and Group Bonus Calculations*

1. Performances shall be measured and earnings calculated separately for each individual's work whenever practical. Whenever the group plan is used, the standard hours of work produced by the group will be distributed to the individual employees of the group in relation to each individual's hours on standard to the total group hours on standard, and paid at each individual employee's base rate.

E. Daily Work Reports

1. The activity of the employee will normally be recorded on a form by the foreman. An employee may record his own activity on his work report in those cases where it is impractical for this to be done by the supervisor.

2. Should there be any error in the quantity or quality of the work reported on the work report, bonus will be calculated on the corrected report for the period of time in question. Should a deliberate error be made on a work report prepared by an employee, the employee will be subject to disciplinary action.

3. All work reports must be approved by the supervisor as to quality and quantity of work performed. He shall make such weight counts, physical counts or other checks as may be necessary to verify the accuracy of the reports.

4. No change shall be made in an employee's work report unless such change has been thoroughly discussed with the employee by the supervisor, and the employee understands the change. If the employee disagrees with the change, the matter shall be subject to the grievance and arbitration procedure.

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F. Reprocessing Sub-standard Work or Parts

1. Reprocessing of defective work or parts by the employee responsible for the defective work will be paid on base rates. Reprocessing of defective work or parts by other employees than the one who is responsible for the same will be subject to compensation under the transfer provisions of Article VII of the General Contract.

IV. RELATION TO GENERAL CONTRACT

A. This Stipulation shall be deemed part of the General Contract between Local No. 270 and Ballman-Cummings Furniture Company and Fort Smith Chair Company, and in any respect in which the provisions of this Stipulation are inconsistent with the General Contract, the provisions of this Stipulation shall govern.

LOCAL NO. 270 OF THE UNITED FURNITURE
WORKERS OF AMERICA, A. F. of L.-C.I.O.

.....
President

.....

Business Representative

.....

.....

.....

.....

(Negotiating Committee)

BALLMAN-CUMMINGS FURNITURE COMPANY

By

FORT SMITH CHAIR COMPANY

By

General Counsel's Exhibit 2

(EXHIBIT B)

A G R E E M E N T

THIS AGREEMENT, made and entered into this 15th day of October, 1958, by and between FORT SMITH CHAIR COMPANY, FORT SMITH TABLE COMPANY, BORDER QUEEN, INC., BALLMAN-CUMMINGS FURNITURE COMPANY and GARRISON FURNITURE COMPANY, hereinafter called the "Companies", parties of the first part, and the UNITED FURNITURE WORKERS OF AMERICA, A.F. of L.-C.I.O., hereinafter called the "Union", parties of the second part, as follows:

ARTICLE I

RECOGNITION

Section 1. The Companies recognize the Union as the sole and exclusive bargaining agent for all production and maintenance employees, exclusive of office, clerical and supervisory employees, foremen, inspectors who do no production work, time-keepers, salesmen and over-the-road truck drivers.

Section 2. The Companies agree to deduct, as to those employees who authorize it in writing, initiation fees, regular monthly dues and any assessments authorized by the Union in accordance with its by-laws, from the second pay day each month of such employees and shall remit the money so deducted to the Financial Secretary of the Union not later than the 22nd day of the current month. This shall not apply to fines for non-attendance at meetings or other penalties.

Section 3. New employees will be on probation during the first thirty (30) days worked for a Company, and dur-

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ing that time the Company shall have the right to discharge such employees without any recourse by the Union or the employee. The Company will advise the Union at least four (4) days before the end of the probationary period regarding the probability of any new employee being retained as a permanent employee. Employees retained beyond such probationary period shall have their seniority status commence from the first day of their employment with the Company.

Section 4. All employees who are new, or who may hereafter become members of the Union shall remain members in good standing during the life of this agreement. Any new employee hired after the effective date of this agreement shall become members within thirty (30) working days after their employment.

(It is understood that the foregoing provisions of this Section shall not be operative unless and until such time as any state or federal laws prohibiting the operation of such a provision are either nullified or declared unconstitutional or are otherwise complied with.)

ARTICLE II**No STRIKES OR LOCKOUTS**

Section 1. There shall be no strikes, walk-outs, lock-outs or other interference with or interruption of production of any nature for any reason whatsoever during the period of this agreement, and any extension thereof, except that this Section shall not apply to any Company or to the Union in the event either should refuse to participate in arbitration of any issue as herein provided, or if either party should refuse to follow an adverse ruling of the arbitrator.

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Section 2. If during the life of this agreement any action occurs which is in violation of the foregoing section, and if such action has not been authorized, instigated, engaged in or ratified by the Union, its officers and agents, then the Union, its officers and agents, shall not be held liable for or responsible for damages by reason of such action in violation of this foregoing Section if the Union, its officers and agents, will take reasonable means (including but not limited to notification to persons involved to discontinue such action, forbidding of picket lines, etc.) to bring an end to such action which violates the foregoing Section. Any employees engaging in such unlawful action in violation of the foregoing provision are not hereby relieved of responsibility therefor and shall be subject to disciplinary action.

ARTICLE III

MANAGEMENT

The management of the Companies' plants and works and the direction of their working forces, including the right to hire and to relieve employees from active duty (subject to the provisions of Article IV) because of lack of work or other legitimate reasons, and the right to suspend, discipline or discharge for proper cause shall be vested exclusively in the Companies, subject to the limitations herein agreed upon.

ARTICLE IV

SENIORITY

Section 1. In all cases of promotion, as well as in cases of increase or decrease of forces, employees shall be given preference in accordance with the length of their continu-

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ous service, subject to their ability to perform the work in question with reasonable efficiency. Temporary lay-offs due to lack of work, illness of the employee or other cause beyond the control of the parties, shall not constitute interruptions of continuous service as those terms are used in this Section; provided, however, that the continuous service of an employee shall terminate when he shall not have performed any work for his Employer for a period of one year, as well as upon resignation or discharge for proper cause.

Section 2. Employees who indicate a desire to be promoted to any vacancies or new positions which may be available from time to time shall be promoted in accordance with the foregoing provisions of Section 1, when, in the opinion of the management, the employee is qualified by reason of having the necessary capacity and aptitude to perform the work involved satisfactorily. Any employee who is so promoted and is unable within a reasonable time to fill such new position with reasonable efficiency shall be restored to his former job without loss of seniority and at his former rate of pay.

The Union Steward will be notified by the Company when any vacancies occur.

Wherever possible, the Company will fill vacancies from among existing personnel rather than hiring new employees from the outside.

A promotion is defined as an advancement to an opening involving greater responsibility and skill as well as the opportunity of higher earnings.

Section 3. An employee will be considered as having resigned under either of the following conditions:

- (a) Unreported absence for three consecutive work days.

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(b) Failure to return to work within five work days after receipt of notice of recall, unless the time is extended by reason of illness or some other compelling reason. Notice of recall shall be considered given under this section when sent to the employee's last address left on file by the employee at the Company's office.

Section 4. A copy of the seniority list will be prepared by each Company and forwarded to the Union office and to the Chief Shop Steward. A copy will also be kept available in each plant office for inspection. Such seniority lists will be revised and brought up to date semi-annually.

Section 5 (a). In case of reduction in force in any department of one day or less, probationary employees shall first be laid off. If further reduction is necessary, the employee who normally performs the available work will be retained, and if he is not available, the senior qualified employee in the department who is laid off but available will be given the work. Where two or more employees normally perform the same work operation, the senior employee, or employees, will be retained.

(b) In case of temporary reductions in force in a department lasting more than one day, lay offs will be in order of least seniority, provided the available senior employees in the department are able to do the remaining work with normal efficiency and without further training. In those plants which have no job classification rates, employees accepting transfer to avoid lay off will receive the rate (including incentives earned, if any) which was paid the man displaced.

Section 6. Union Shop Stewards, President, Vice-President, Financial Secretary, Treasurer and Trustees of the

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Local Union shall have preferred seniority over other employees in lay offs and rehiring after lay offs during periods they hold such offices, subject to the ability of the Union officer to perform the available work satisfactorily. After completion of their tenure of office, such individuals shall be restored to their normal seniority status. For the purpose of this Section, the number of Shop Stewards shall be limited to one steward for each department. If the department contains more than twenty-five (25) employees, there may be one additional steward for each twenty-five (25) employees.

ARTICLE V**EMPLOYEES CALLED TO WORK TO RECEIVE
FOUR (4) HOURS' WORK OR PAY**

The Company agrees to notify employees or post a notice in the respective departments to employees who are not to report for work on the next regular work day. If any employee has not been notified not to report for work, it is assumed that he will have work when he reports, and the Company agrees to give every such employee four (4) hours' work within the first five (5) hours of the regular work day, or four (4) hours' pay. The provisions of this Section shall not apply where the failure to provide work is due to causes beyond the control of the Company.

A company will have discharged its obligation to notify an employee not to report for work to avoid the four (4) hours reporting pay by posting a notice on the department bulletin board prior to quitting time, except as to those employees on lay-off. Notice to employees on lay-off, on leave of absence, or absent because of illness shall be given by sending the notice to the last address left on file at the Company office by such employee, it being the employee's duty to keep an up-to-date address on file with the Company.

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ARTICLE VI

HOURS OF WORK AND HOLIDAY PAY

Section 1. The regular work day shall consist of eight (8) consecutive hours a day, exclusive of the lunch period. The regular work week shall consist of forty (40) hours comprising five (5) consecutive days, Monday through Friday, inclusive, except when a holiday falls within the work week and no work is performed, it shall be considered as a day worked for the purposes of the overtime provisions set forth in this Article. The regularly scheduled work week for the purpose of computing the sixth and seventh days worked shall begin at the starting time Monday morning of each week.

Section 2. Overtime at the rate of one and one-half times the regular hourly or earned rate, whichever is greater, shall be paid:

(a) For all production work performed on the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day;

(b) For all work performed in excess of eight (8) hours in any one day, or forty (40) hours in any one week (but it is understood that daily and weekly overtime shall not be pyramided):

(c) For all production work performed on the sixth day worked in any regular scheduled work week.

Overtime shall be paid at twice the regular hourly or earned rate, whichever is greater, for all production work performed on the seventh consecutive day worked in any scheduled work week.

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Section 3. For the purpose of computing the sixth and seventh day worked, the following days shall be counted as days worked although no work is performed thereon:

- (a) The above named holidays;
- (b) When an employee reports for work in the usual course, not having been otherwise instructed, and is sent home for lack of work;
- (c) A partial day's absence caused by injury at work or illness during work causing the employee to be sent home. (This is intended to include successive days (of absence) resulting from injury on the job);
- (d) A full or partial day's absence caused by lack of work. (This is intended to grant credit for days of absence resulting from lay off.)

Section 4. The foregoing provisions for time and one-half on the sixth day worked and on the above named holidays and for double time on the seventh day worked shall not apply to watchmen, firemen, engineers, and maintenance men when not performing any production work.

Section 5. Employees who meet the qualifications hereinafter recited will receive eight (8) hours' straight-time pay for New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, regardless of the day of the week on which such holidays fall, provided:

- (a) They have passed their probationary periods as of the given holiday; and
- (b) They report for work and work their full scheduled work day immediately preceding and following the holiday provided however, that absence

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from work on either or both of such days for any of the following reasons will not forfeit the holiday pay:

(1) Sickness or physical injury of the employee preventing work verified by physician's certificate providing the employee has been at work within five (5) days before or after the holiday;

(2) The employee is in lay-off status at the time of the holiday, providing the employee has been at work within five (5) days before or after the holiday;

(3) Jury duty or other compulsory appearance in court or compulsory appearance under order of draft board providing the employee has been at work within five (5) days before or after the holiday;

(4) Serving on the Union Shop Committee or the Union Negotiations Committee when handling grievances or negotiations with the Companies or attending Union Conventions as a delegate;

(5) Death in the employee's immediate family (father, mother, sister, brother, wife, husband or child).

In the event a plant is shut down by the management for the entire week between Christmas and New Year's, then employees who qualify for Christmas Day pay will be considered eligible for the New Year's Day pay and the scheduled work day immediately following New Year's Day will be considered as the next scheduled working day immediately following Christmas. Tardiness in reporting for work up to thirty (30) minutes on the scheduled work day before or after a given holiday will not forfeit the holiday pay for an otherwise eligible employee.

The rate of holiday pay in the case of incentive workers shall be computed in the same manner as for vacation pay.

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Employees who are called in to work on any of the holidays listed in this Section shall, if eligible, receive the holiday pay above provided for in addition to whatever pay they would receive under other provisions of this contract for working on the holiday. However, if employees are called in to work on such holiday and fail to report, they shall forfeit the holiday pay for such day.

Section 6. When any of the holidays listed in Section 2(a) or Section 5 of this Article fall on Sunday, they will be observed on the following Monday with the respective provisions of those sections applying to such following Mondays.

Section 7. Any overtime work (either on regular work days or Saturdays) will be assigned to the employee who normally performs that work during regular work hours. If such employee is not available, the work will be assigned to the senior employee in the department who is qualified.

Section 8.

(a) There shall be a seven (7) minute rest period each work day between starting time and the lunch hour. Piece workers and incentive workers shall not turn in day work tickets for this time.

(b) After ninety (90) days from the date of this agreement, this provision shall be subject to cancellation at any time by any Company if it is abused, or if production is adversely affected. However, before exercising the privilege of cancellation, the Company will notify the Chief Shop Steward and the Business Representative of the Union at least ten (10) days in advance of cancellation calling attention to the reasons in order that the Union may have the opportunity of correcting the situation. The final decision of continuing or cancelling the arrangement shall be in the discretion of the Company, without recourse.

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ARTICLE VII

TRANSFER TO OTHER JOBS

Section 1. When an employee is temporarily transferred by the Company for its convenience or advantage from his regular position when work is available thereon, he shall be paid as follows:

A. In the case of an employee on incentive work, he shall receive his average hourly earnings computed as in the case of his last holiday pay.

B. When there is a job classification and rate, the employee shall receive his regular hourly rate, or the base rate for the job to which transferred, whichever is greater. If the employee's regular job includes incentive earnings, he shall receive his average hourly earnings computed as in the case of his last holiday pay, or the base rate for the job to which transferred, including incentive earnings, if any, on that job, whichever is greater.

C. Where there is no job classification rate or incentive earnings, the employee shall receive his regular hourly rate. If such transfer is to a higher paid job and such temporary work lasts longer than five days, it shall then be determined by the parties as to whether the transfer has become permanent, or is to continue longer as temporary. When the transfer has become permanent, it shall then be determined to what higher rate the man will be raised. If, also, at the end of five days, the parties consider that the transfer will continue as temporary, but for a considerable length of time, the parties will discuss what higher rate is appropriate for the man during the interim.

Section 2. When an employee is temporarily transferred from his regular position when no work is available thereon, he shall be paid as follows:

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A. In the case of an employee normally on incentive work, he shall receive his regular day work rate, or incentives earned, whichever is greater, or if there is a job classification rate for the job to which transferred, the employee shall receive the base rate for the job, including incentives earned, if any, it being understood that an employee so transferred has the right at his option to refuse the transfer and accept a lay-off instead, unless he is offered his average rate of pay.

B. In the case of an hourly rate worker in a plant having job classifications and rates, the employees shall receive the base rate for the job to which transferred, including incentive earnings, if any.

C. Where there are no job classification rates or incentive rates, the employee shall receive his regular hourly rate. If such transfer is to a higher paid job and such temporary work lasts longer than five days, it shall then be determined by the parties as to whether the transfer has become permanent, or is to continue longer as temporary. When the transfer has become permanent, it shall then be determined to what higher rate the man will be raised. If, also, at the end of five days, the parties consider that the transfer will continue as temporary, but for a considerable length of time, the parties will discuss what higher rate is appropriate for the man during the interim.

ARTICLE VIII**PERFORMING PROTECTIVE AND MAINTENANCE WORK
DURING A STRIKE**

The Union will furnish men during any strike occurring after the expiration of this agreement, at the option of the Company, to unload materials or to maintain and protect the Companies' property providing the Company is not at that time engaging in productive operations.

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ARTICLE IX

ADJUSTMENT OF GRIEVANCES

Section 1. A grievance is any disagreement between the Company and the Union, or between a Company and any employee or employees within the bargaining unit, concerning wages, hours and working conditions or concerning the effect, interpretation, application, claim of breach or violation of this Agreement.

Section 2. A grievance shall be processed in accordance with the following procedure:

Step 1. An individual employee who has a grievance shall first take the matter up with his foreman, and he shall have the right to have the assistance of his department shop steward. The foreman shall give his answer to the grievance not later than the work day following the day the matter is presented to him.

Step 2. If the matter has not been satisfactorily settled, the grievance shall be reduced to writing stating the name of the company, name of the employees aggrieved, department, date grievance occurred, statement of the grievance including reference to contract provision involved, and nature of settlement requested. The grievance shall be signed by the employee and the Chief Steward, and presented to the Plant Superintendent within two working days following the foreman's answer. The matter shall then be considered by the Plant Superintendent, the employee's foreman, and the Shop Steward's Committee. The Plant Superintendent shall give his answer to the grievance in writing within two working days after meeting with the committee.

Step 3. If the matter has not been satisfactorily settled the Union shall, within two working days after the Superin-

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tendent's answer, request a meeting between the manager of the company and/or his designated representative, and the Shop Steward's Committee, including the Business Representative, or other designated representative, of the Union. This meeting shall be held within one week of the date of the request, unless either party requests an extension for cause, and the aggrieved party shall receive an answer in writing within three working days after the meeting.

Step 4. If the matter has not been satisfactorily settled in Step 3, it shall be taken up between the Business Representative of the Union and the attorney for the Companies, and if the matter has not been satisfactorily resolved within five (5) days (excluding Saturday and Sunday) either party may, within four (4) days thereafter, make written request that the matter be submitted to arbitration.

Section 3. Disagreements not resolved in the foregoing steps of the grievance procedure may be submitted to arbitration. Reverend Leo C. Brown, S. J., is hereby appointed arbitrator by the parties. Father Brown is authorized to appoint a substitute arbitrator if he cannot attend a hearing within three (3) weeks from the date of notice to him, and if he is directed to make such appointment by either party. In the event of the subsequent resignation, refusal or inability to act of Father Brown, such vacancy shall be filled by a successor to be mutually agreed upon by the Companies and the Union.

Section 4. The arbitrator shall have the power, duty and authority to:

A. Consider, pass upon and decide any and all complaints or grievances submitted pursuant to Section 3, and to determine any question of his own jurisdiction.

General Counsel's Exhibit 2

B. Establish rules or procedures relating to the form and manner of presenting or hearing complaints or grievances and shall give due and timely notice to parties in interest of any hearings or actions thereon.

C. Make such order of restitution, rectification or penalty against any person or party as may be fair and equitable under any given circumstances.

D. Do any and all other things reasonably necessary or incident to the carrying out of the foregoing powers, duties and authorities.

Section 5. The arbitrator shall not have the power to add to or subtract from or change any of the terms of this Agreement.

Section 6. All decisions of the Arbitrator shall be final, conclusive and binding upon all parties, and there shall be no appeal from such decision. All parties agree to abide by and comply with any and all decisions or orders made by the Arbitrator.

Section 7. The Arbitrator in deciding all issues properly submitted to him, shall be guided by a desire to treat all persons with fairness and equity consistent with fair treatment of workers and with the necessity for uninterrupted and profitable operation by the Companies, to the end that mutually harmonious relations between the parties may prevail during the entire period of this Agreement.

Section 8. All expenses incident to the existence and operation of the Arbitrator shall be borne equally by the Company and the Union.

Section 9. Grievances involving questions of general policy and interpretation of the Agreement, as distin-

General Counsel's Exhibit 2

guished from the complaints of individuals, may be initiated in writing in Step 3 of the grievance procedure by either party, and thereafter shall proceed as any other grievance.

Section 10. The Company shall not be liable for more than five (5) days' back pay prior to the date on which a grievance is presented in writing. Grievances shall in all cases be presented promptly after the occurrence which is the basis for the complaint.

Section 11. Grievance committees shall be allowed not to exceed one (1) hours' time during working hours for the purpose of presenting grievances, without loss of pay.

ARTICLE X**LEAVES OF ABSENCE**

Section 1. Leaves of absence shall be granted to employees as requested by the Union when entering the full time employ of the Union. Such leaves shall be limited to one employee per year. Union requests for any additional employees shall be given due consideration. Any leaves so granted shall extend for one year but shall be renewable from year to year when requested by the Union.

Employees who have been on leave of absence by reason of employment by the Union shall be restored to their former job, or to work which they are able to do with reasonable efficiency if their job has been abolished or is filled, at their former rate plus any accumulated general wage increases granted during the leave. Such restoration shall take place within one week after the Union notified the Company of the employee's desire to return to his job.

General Counsel's Exhibit 2

Section 2. Temporary leaves of absence shall be granted for a reasonable period of time to a reasonable number of employees for the purpose of attending Union conventions or for other legitimate Union business.

Section 3. The Companies will grant to employees leaves of absence in writing upon reasonable grounds and for reasonable periods of time. All such leaves granted shall be in writing with a copy furnished to the Union.

Section 4. It is understood that employees who are drafted or who enlist in the Armed Forces during a war or national emergency and who return to work following such military service in compliance with the Selective Service Act shall immediately upon resumption of work come within the terms of the insurance plan as set forth in Article XII, and shall also have all other seniority, vacation and other employment rights as are provided by law.

ARTICLE XI**VACATIONS**

Section 1. The Companies shall grant one week's vacation with pay at forty (40) times the employee's regular hourly rate for employees having at least one year and less than five years' continuous service with the Company, and two weeks with pay at eighty (80) times the employee's regular hourly rate for employees having five (5) or more years continuous service with the Company. In the case of pieceworkers, their regular hourly rate for the purpose of this Section shall be their average straight-time hourly earnings computed over a period of ninety (90) days prior to the vacation period.

Section 2. July 1st of each year during which this agreement is in effect shall be the date as of which the

General Counsel's Exhibit 2

eligibility of each employee for vacation benefits shall be determined in accordance with all the requirements for eligibility set forth in this Article.

Section 3. As a further condition to participation in this vacation plan, otherwise eligible employees must also have worked a total of 1850 clock hours in the period of one year immediately prior to July 1. Time lost from work for any of the following reasons shall be considered as time worked for the purpose of accumulating hours of work under this requirement:

- (a) Sickness proved by physician's certificate;
- (b) Physical injury preventing work;
- (c) Jury duty or other compulsory appearance in court or compulsory appearance under order of a draft board;
- (d) Layoff at the instance of the Company; provided, however, that if layoffs should consume in the aggregate more than four months, then such time longer than four months shall not be counted for the purpose of accumulating hours of work under this plan;
- (e) Vacations taken pursuant to this or preceding vacation plans;
- (f) Serving on the Union Shop Committee or Negotiations Committee when handling grievances or negotiations with the Companies or attending Union Conventions as a delegate;
- (g) Leaves of absence granted in writing by the Company, provided such leaves are for serious emergencies such as deaths or serious illness in the immediate family.

General Counsel's Exhibit 2

Section 4. The vacation period shall be arranged at times between June 1st and September 30th which will not interfere with the Companies' production requirements. The Companies will give at least two weeks' advance notice to employees of the vacation schedule which will not thereafter be changed by the Companies.

Section 5. The Companies, or any of them, shall have the option in arranging for vacation schedule of closing down the plant for one week and of paying cash in lieu of time off for a second week's vacation to employees eligible for such benefits.

ARTICLE XII

GENERAL PROVISIONS

Section 1. Bulletin boards shall be made available for posting notices of union meetings and elections. Any other union notices or material shall be approved by the management before posting.

Section 2. The Business Representative of the Union shall have the opportunity of visiting the plant of any company at reasonable times for purposes pertaining to plant grievances or other legitimate purposes, upon first securing permission of the management.

Section 3. Elderly or handicapped employees may be given suitable easier work at appropriate rates of pay by mutual agreement between the Company, the Union and the Employee.

Section 4. During the life of this Agreement, the Companies agree to contribute monthly on or before the 10th day of each month a sum equal to 3% of its gross payroll for the preceding month of the employees in the bargaining unit covered by this agreement to the United Furniture Workers Insurance Fund at 700 Broadway, New York, N. Y.,

General Counsel's Exhibit 2

for the purpose of purchasing and furnishing its group insurance benefits to said employees. Such benefits shall be furnished to all employees in the bargaining unit without discrimination.

The term "gross payroll" as used above is understood to include vacation and paid holiday payments on which the three per cent will apply.

The Companies shall not be obligated to make the 3% contribution with respect to the wages of any employee prior to the completion of his probationary period as set forth in Article I, Section 3.

Section 5. If any employee suffers an injury on the job he will be paid at his hourly rate for any time lost from work on the day of such injury. Employees will be eligible for this lost time pay only when directed not to engage further in work because of such injury by the management or by the company physician. If there is any doubt or question about such employee's ability to perform work he will be sent promptly to the Company physician for examination.

If such injured employee is directed by the doctor to report for subsequent treatment during normal work hours he or she shall be paid by the Company at his or her base rate for the time necessarily spent in receiving such further treatment, and the Company shall have the right to arrange appointments for treatment during working hours in order to avoid as far as possible loss of production.

Section 6. Supervisory employees, foremen, and assistant foremen shall not perform work regularly on the production lines, except in the following situations:

1. To train and instruct workmen.
2. When regular employees are absent from their place of work and when necessary to straighten out production difficulties.

General Counsel's Exhibit 2

3. For experimental or development work.
4. To demonstrate or test correctness of standards.

ARTICLE XIII

WAGES

Section 1. The hourly rates of all employees of Border Queen, Inc., Fort Smith Table Company, and Garrison Furniture Company shall be increased by three cents (3¢) per hour, effective April 15, 1959, and by five cents (5¢) per hour, effective October 15, 1959. All employees of Ballman Cummings Furniture Company and Fort Smith Chair Company shall receive three cents (3¢) per hour, effective April 15, 1959, and five cents (5¢) per hour, effective October 15, 1959, in addition to the present job evaluated base rates and incentives, if any, earned thereon.

Section 2.

(a) The following minimum hourly rates shall be in effect for Fort Smith Table Company and Garrison Furniture Company through April 14, 1959:

- | | |
|---|-----------------|
| (a) Starting rate | \$1.00 per hour |
| (b) After 30 days actually worked by
the employee | 1.05 per hour |
| (c) After 60 days actually worked by
the employee | 1.08 per hour |
| (d) After 90 days actually worked by
the employee | 1.11 per hour |
| (e) After 180 days actually worked by
the employee | 1.15 per hour |

General Counsel's Exhibit 2

Effective April 15, 1959, paragraph (e) above shall be amended to read:

- (e) After 180 days actually worked by
the employee \$1.18 per hour

Effective October 15, 1959, paragraph (e) above shall be amended to read:

- (e) After 180 days actually worked by
the employee \$1.23 per hour

(B) The following minimum hourly rates shall be in effect for Border Queen, Inc., through April 14, 1959:

- (a) Starting rate \$1.00 per hour
(b) After 30 days actually worked by
the employee 1.03 per hour
(c) After 60 days actually worked by
the employee 1.06 per hour
(d) After 90 days actually worked by
the employee 1.09 per hour
(e) After 180 days actually worked by
the employee 1.13 per hour

Effective April 15, 1959, paragraph (e) above shall be amended to read:

- (e) After 180 days actually worked by
the employee \$1.16 per hour

Effective October 15, 1959, paragraph (e) above shall be amended to read:

- (e) After 180 days actually worked
by the employee 1.21 per hour

Section 3. The rates of pay established by this Agreement, and by the Stipulation pertaining to Ballman-Cum-

General Counsel's Exhibit 2

mings Furniture Company and Fort Smith Chair Company which is made a part hereof, shall not be subject to change during the period of this Agreement, and there shall be no reduction of hourly or piece work rates during the period of this Agreement.

Section 4. Incentive rates in those plants having no job classification rates will be set to afford the employee with equal effort the opportunity of making earnings comparable to their vacation average for 1958 plus the general increases granted by this contract. However, at such time as any additional plant installs a new incentive plan and job classification rates through engineering as proposed in a 1956 letter, then the parties will at that time agree upon an appropriate method of establishing incentive rates as a part of such plan.

If any dispute arises from this provision, or from the administration of job evaluation, classification and incentive system established by this agreement and the stipulation attached hereto, the Arbitrator is authorized to employ a competent engineer to assist him and the parties to arrive at a decision that carries out the purpose of this provision, or of the job evaluation, classification and incentive system, as the case may be.

The principal of the preservation of past average earnings applies only to individuals and not to jobs or operations.

ARTICLE XIV

TERMINATION

Section 1. This Agreement shall become effective on October 15, 1958, and shall run to and including October 14, 1960. Either party shall give to the other notice in writing at least sixty (60) days prior to said expiration date of its desire to amend or cancel this agreement on said expiration date. In the absence of such notice, this Agreement shall continue in effect for an additional year.

General Counsel's Exhibit 2

IN WITNESS WHEREOF, this Agreement has been executed
on the date noted in the preamble.

LOCAL NO. 270 OF THE UNITED FURNITURE
WORKERS OF AMERICA, A.F. of L.-C.I.O.

.....
President

.....
Business Representative

.....
Negotiating Committee

FORT SMITH CHAIR COMPANY

By.....

FORT SMITH TABLE COMPANY

By.....

BORDER QUEEN, INC.

By.....

BALLMAN-CUMMINGS FURNITURE COMPANY

By.....

GARRISON COMPANY

By.....

General Counsel's Exhibit 2

(EXHIBIT C)

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO

March 27, 1961

John Ayers, Pres.
Ft. Smith Chair Company
North 3rd Street
Fort Smith, Arkansas

Dear Sir:

On behalf of our organization, it is our desire to cancel the labor agreement between your Company, and our organization and to negotiate a new contract to take the place of the contract expiring June 1, 1961.

We herewith give you 60 days notice as provided in the Taft-Hartley-Bill, and we also, herewith give you 60 days notice as provided for in Article XIV of the existing labor contract between your Company and the United Furniture Workers of America, AFL-CIO, Local #270 thereof, that the Union will consider the contract as terminating on the date fixed herein for expiration namely June 1, 1961. The Union will keep in effect the existing terms and conditions of employment until the expiration date of said contract, namely June 1, 1961.

Inasmuch as the place and time for the meeting has not been selected, we can mutually agree to this at a later date.

It is our hope that we will have no difficulty in reaching a new and modified agreement on wages and working conditions and other conditions of employment.

489a

General Counsel's Exhibit 3

Yours very truly,

LOUIE CAMPBELL
Business Repr. &
Int'l Vice-Pres.
ELMER BOST, Pres.
Local #270

LC/vs
cc:

General Counsel's Exhibit 3

Law Offices
BETHELL & PEARCE
107 Professional Life Building
Fort Smith, Arkansas

October 15, 1960

Mr. Louie Campbell, Business Representative
United Furniture Workers of America
Fort Smith, Arkansas

Re: Fort Smith Chair Company—
Collective Bargaining Contract

Dear Mr. Campbell:

Upon expiration of the Collective Bargaining Agreement between Fort Smith Chair Company and United Furniture Workers of America, it is agreed by and between the parties that the said agreement shall be continued in full force and effect without any change whatever, except as hereafter stated, through the 31st day of May, 1961. The only change in said Agreement is that in any classification in which the base rate is less than \$1.25 per hour, the rate shall be in-

General Counsel's Exhibit 3

creased to that figure effective October 15, 1960. It is further agreed that the Company will increase its contribution to the insurance plan to 3½%, rather than 3% as heretofore.

Otherwise the contract shall continue in all respects through May 31, 1961. If the foregoing represents your understanding, please note your acceptance on the foot of this letter in the place provided.

Sincerely yours,

BETHELL & PEARCE
Edgar E. Bethell
EDGAR E. BETHELL
Attorney for Fort Smith
Chair Company
JOHN G. AYERS

EEB/sm

Accepted:

Louie Campbell
LOUIE CAMPBELL, Business Representative
United Furniture Workers of America

General Counsel's Exhibit 4

Law Offices
BETHELL & PEARCE
107 Professional Life Building
Fort Smith, Arkansas

February 23, 1961

Mr. Louie Campbell, Business Representative
Local No. 270, United Furniture Workers
Fort Smith, Arkansas

Re: Fort Smith Chair Company

Dear Louie:

This letter is to confirm an understanding between the Company and the Union reached in connection with the negotiation of the current contract which is to expire June 1, 1961. In view of the fact that eligibility for vacation and compensation is not determined under the contract until July 1, 1961, and the contract by its terms expires June 1, it is agreed that no employee will be prejudiced in qualifying for or receiving vacation and/or compensation by virtue of the expiration of the contract on June 1 regardless of whether the parties are able to reach a new agreement, or whether there should be a work stoppage. In the event of a work stoppage resulting from inability to agree upon the terms of a new contract, employees who would otherwise be working will be given credit for vacation eligibility for normal work hours up to July 1 while a strike continues.

Trusting the above reflects your understanding, we are

Very truly yours,

BETHELL & PEARCE
EDGAR E. BETHELL

EEB/sm

cc: Mr. John G. Ayers

This vacation pay will be paid by August 1st in case employees are on strike.

JOHN G. AYERS

General Counsel's Exhibit 5

Law Offices
BETHELL & PEARCE
107 Professional Life Building
Fort Smith, Arkansas

March 17, 1961

Mr. Louie Campbell, Business Representative
United Furniture Workers of America
Fort Smith, Arkansas

Re: Fort Smith Chair Company—Stipulation
Governing Job Classification and Evaluation

Dear Mr. Campbell:

In connection with re-negotiation of the collective bargaining agreement affecting the employees of Fort Smith Chair Company, it was agreed that the Stipulation governing job classification and evaluation, and the incentive system, which was effective October 15, 1958 through October 14, 1960, would be continued in effect until the expiration of the basic agreement between the parties.

As a matter of clarification, it was agreed that when a standard has not been posted and put in effect by the time a sample or pilot run has been completed, then when a standard is available incentive earnings, if any, will be computed retroactive to the date that the sample or pilot run was completed. The computation of such incentive will be based upon the employee's daily job card.

If the foregoing represents your understanding, you may indicate your acceptance in the place indicated in the left-hand corner of this letter.

493a

General Counsel's Exhibit 6

Very truly yours,

BETHELL & PEARCE
EDGAR E. BETHELL
Attorneys for Fort Smith
Chair Company
JOHN G. AYERS

Accepted:

LOUIE CAMPBELL
Business Representative
United Furniture Workers

EEB/sm

General Counsel's Exhibit 6

COPY

ARTICLE IV

Section 1. Seniority is defined as the length of continuous service with the Company.

Section 2. In case of reduction in force in any department of one (1) day or less, probationary employees shall first be laid off. If further reduction is necessary, the employee who normally performs the available work will be retained, and if he is not available, the senior qualified employee in the department who is laid off but available will be given the work. Where two or more employees normally perform the same work operation, the senior employee, or employees, will be retained.

Section 3. In all lay-offs lasting more than one day, lay-off will be by departments, and the junior employees in the department will be laid off, provided the remaining senior employees are able to do the remaining work with

General Counsel's Exhibit 6

normal efficiency and without further training. Employees reassigned in connection with a lay-off will receive the rate for the job to which assigned, including incentives earned if any. Recalls will be in reverse order of lay-off.¹

Section 4. A promotion is defined as an advancement to an opening involving greater responsibility and skill as well as the opportunity of higher earnings. The department steward will be notified by the Company when a permanent vacancy occurs. Employees who indicated a desire to be promoted to any permanent vacancy or new position will be given preference in accordance with continuous length of service with the Company when, in the opinion of the management, the employee is qualified by reason of having the necessary capacity and aptitude to perform the work involved satisfactorily. Any employee who is so promoted and is unable within a reasonable time to fill such new position with reasonable efficiency shall be restored to his former job without loss of seniority and at his former rate of pay. d Whenever possible, the company will fill vacancies from among existing personnel rather than hiring new employees from the outside.

Section 5. An employee will be considered as having resigned under any of the following conditions:

(a) Unreported absence of r three consecutive work days.

(b) Failure to return to work within five days after receipt of notice of recall, unless the time is extended by reason of illness or some other compelling reason. Notice of recall shall be considered given under this section when sent to the employee's last address left on file by the employee at the Company office.

General Counsel's Exhibit 6

(c) Failure or inability to perform work for the company for a period of one year.

(d) Resignation, or discharge for proper cause.

Section 6. It is the obligation of each employee to attend work regularly unless prevented by illness or other circumstance beyond the control of the employee. If an employee is unable to attend work, he must notify the Company as soon as practical of the fact of his absence, the reason for it, and when he may be expected to return. If it appears that he will be unable to report on the date stated, he must so notify the company and give a new reporting date. Frequent absence will be good cause for discharge.

Section 7. A copy of the seniority list will be prepared by the Company and forwarded to the Union office and to the Chief Shop Steward. A copy will also be kept available in the plant office for inspection. Such seniority list will be revised and brought up to date semi-annually.

Section 8. Union Shop Stewards, President, Vice Presidents, Financial Secretary, Treasurer and Trustees of the Local Union shall have preferred seniority over other employees in lay offs and rehiring after lay offs during periods when they hold such offices, subject to the ability of the Union officer to perform the available work satisfactorily. After completion of their tenure of office, such individual shall be restored to their normal seniority status. For the purpose of this section, the number of Shop Stewards shall be limited to one steward for each department. If a department contains more than twenty-five employees, there may be one additional steward for each 25 employees.

General Counsel's Exhibit 6

ARTICLE V

(Second paragraph) The Company will have discharged its obligation to notify an employee not to report for work to avoid the four (4) hours' reporting kpay by posting a notice on the department bulletin board prior to quitting time, except as to those employees on lay off. Notice to employees on lay off shall be given by sending the notice to the last address left on file at the Company office by such employee, it being the employee's duty to keep an up-to-date address on file with the Company.

ARTICLE IX

Section 3. Disagreements not resolved in the foregoing steps of the grievance procedure may be submitted to arbitration. When either party requests arbitration, the parties will jointly request the Federal Mediation and Conciliation Service to submit a list of at least five (5) proposed arbitrators. With the flip of a coin giving first choice, each party shall strike a name from the list until only one remains, and that person will be requested to serve as arbitrator.

Section 10. The Company shall not be liable for more than five (5) days' back pay prior to the date on which a grievance is presented in writing. All grievances, except those involving the question of the correctness of incentive standards, must be presented in writing within ten (10) days after the date on which the action or omission causing the grievance occurs or the complaint will be deemed to have been waived.

Section 11. All grievance meetings will be held outside working hours.

General Counsel's Exhibit 6

STIPULATION

GENERAL PROVISIONS

4. The evaluation of any new or changed jobs shall be subject to negotiation, and the grievance and arbitration procedures. An employees' committee consisting of not more than 3 employees will be given the opportunity of assisting in job evaluation. However, if the committee declines to meet with the company, or fails to reach an agreement, the company will evaluate the job and recourse of the Union will be through the grievance procedure.

6. Employees on incentive operations will be paid base rate on sample and pilot runs when there is no standard set.

STIPULATION

(Page 3)

II-A.1 (Add the following) No bonus will be payable, nor will any employee receive pay at his average hourly earnings, except where expressly provided for in the general agreement and/or the stipulation.

STIPULATION

(Page 4)

B-2 (Add the following) Standards may be increased or decreased as a result of re-study. No employee has a vested right in any level of incentive earnings.

General Counsel's Exhibit 6

STIPULATION

(Page 3)

C-2 (Add the following) and the employee will be notified of the standard time and/or pieces per hour required for standard.

STIPULATION

(Page 5)

D-1. Any employee not satisfied with the standard may in writing on forms furnished by the Company request a further study through his supervisor, or through the Union. The Company may initiate a review of standards on its own motion. In the event that a re-study is unsatisfactory to the employee, the matter shall be reviewed by the Plant Superintendent. If the employee is still not satisfied with the rate, the matter will be subject the arbitration procedure in accordance with the contract; however, there must be a prima facie showing that the standard denies a normal employee a reasonable opportunity to make the bonus earnings mentioned in Article IX-A-1 above before an independent review of the standard will be justified.

STIPULATION

(Page 8)

F-1 (Add the following) The labor cost of re-processing defective work will be deducted from the incentive earnings of the responsible employee. (Handwritten note) Earnings credited to an employee for defective work will be deducted from bonus earnings.

General Counsel's Exhibit 7

Section 11. The Shop Steward's Committee shall consist of not more than three (3) employees, and will be allowed not to exceed one hour's time during working hours in each week for the purpose of presenting grievances. Employees serving on Shop Steward's Committee will be compensated at their base rate of pay.

5/31/61

General Counsel's Exhibit 7

WESTERN UNION TELEGRAM

NSA163

NS FSA169 RX PD—FORT SMITH ARK 8 114P CST—

1961 JUN 8 PM .. 19

LOUIE CAMPBELL, BUSINESS REPRESENTATIVE—

LOCAL 270, UNITED FURNITURE WORKERS
923-½ GARRISON AVE FORT SMITH ARK—

BECAUSE OF THE UNLAWFUL CHARACTER OF THE PRESENT WORK STOPPAGE AT FORT SMITH CHAIR COMPANY YOU ARE ADVISED THAT THE COMPANY DECLINES TO CONTINUE NEGOTIATIONS WITH LOCAL 270 OF THE UNITED FURNITURE WORKERS AND THAT THE EMPLOYMENT OF ALL PEOPLE WHO HAVE PARTICIPATED IN THE UNLAWFUL STRIKE IS TERMINATED—

FORT SMITH CHAIR CO. BY: JOHN AYERS.

500a

General Counsel's Exhibit 8

(Letterhead of)

FORT SMITH CHAIR COMPANY

June 8, 1961

Mr. Clyde Bearce,
Rt. 2, Box 3,
Muldrow, Oklahoma.

Dear Mr. Bearce:

As a result of your participation in the illegal work stoppage at Fort Smith Chair Company, your services with this Company are terminated. A check for any money due you, including your vacation pay and Memorial Day holiday, if earned, will be forwarded to you in the near future. Your past services are appreciated, and we trust you will be able to find a more satisfactory position.

Very truly yours,

FORT SMITH CHAIR COMPANY

John G. Ayers

JOHN G. AYERS,

Sec'y-Treas.

JGA/pc

General Counsel's Exhibit 9

(Letterhead of)

FORT SMITH CHAIR COMPANY

June 8, 1961

Audra Dustman
Rt. 3, Box 127
Muldrow, Oklahoma

Dear Mrs. Dustman:

On June 1 our employees began a work stoppage. Our records reflect that you were not scheduled to be at work on that date. We, therefore, do not know whether you are participating in the strike.

If you are *not* taking part in the strike, you are instructed to report for work at the plant on or before Tuesday, June 13, 1961. If you are unable to report on or before that date, then you must notify us and obtain a leave of absence. If you have not reported for work, or have not made arrangements for a leave of absence on or before Tuesday, June 13, we will assume that you are taking part in the strike, and your employment with the Company will be terminated.

Very truly yours,

FORT SMITH CHAIR COMPANY

John G. Ayers

JOHN G. AYERS,

Sec'y-Treas.

JGA/ed

General Counsel's Exhibit 10

MAKE AN X IN BLOCK OF YOUR CHOICE

Do you wish to accept the Company offer?

No

☐

Yes

☐

General Counsel's Exhibit 11

UNITED FURNITURE WORKERS LOCAL 270
923½ Garrison Avenue
Fort Smith, Arkansas

December 15, 1961

Fort Smith Chair Company
1001 North 3rd St.
Fort Smith, Arkansas

Gentlemen:

This is to inform you that the strike begun by your employees on June 1, 1961, under the auspices of the above labor organization, was terminated by a vote of the membership on December 14, 1961.

I hereby inform you, speaking for all of the employees who went on strike, that they are applying unconditionally for reinstatement to their old jobs, or, if their old jobs are unavailable, to any job with your company. Please consider this letter such application, and a continuing application for employment into the future.

Sincerely,

Louie Campbell
LOUIE CAMPBELL
Business Representative

Intervenor's Exhibit 1

COMPANY PROPOSALS

5/31/61

1—Revise current contract to fit one company and incorporate letter of 3/17/61 regarding retroactive figuring of earnings when no standard available.

2—Add Mother-in-Law and Father-in-Law to Holiday Clause.

3—Add to discussion clause "Discussion shall consist of method to be followed, the standard time and/or pieces per hour required for standard."

4—Add to stipulation "No employee has a vested right in any level of incentive earnings."

5—Section 11. The Shop Steward's Committee shall consist of not more than three (3) employees, and will be allowed not to exceed one hour's time during working hours in each week for the purpose of presenting grievances. Employees serving on Shop Steward's Committee will be compensated at their base rate of pay.

6—When it is necessary for an employee to be absent from work he should notify the company as soon as practical and advise expected time of return to work.

Intervenor's Exhibit 2

(ARBITRATION OPINION AND AWARD)

In the matter of arbitration between
BALLMAN-CUMMINGS FURNITURE COMPANY
Fort Smith, Arkansas

and

UNITED FURNITURE WORKERS, AFL-CIO
LOCAL No. 270

Hearings: August 23, 1960

The issue grows out of a complaint of the hand sanders, dated November 3, 1959, that a change in standards has substantially reduced their earning capacity.

The operators who are making this complaint do finish sanding on the knobs or tops of bed posts. These posts are turned on lathes and then given preliminary sandings in the mill room. The hand sanders do whatever additional sanding is necessary to complete the finish of the wood. The first cutting for the styles in question was made in November, 1957. The rate for hand sanding was established not later than May 23, 1958. At that date the posts were given a preliminary sanding in the mill room on a spindle sander using 3/0 sand paper.

The company, experiencing difficulties getting a proper finish on its posts, began a series of experiments which included rounding off the square shoulders of the posts and giving a second sanding in the mill room on a lathe sander. On the theory that both of these changes lightened the work of hand sanders their production standards were adjusted

Intervenor's Exhibit 2

upwards. The new standards were set on September 25, 1958.

Attempts to improve quality continued, and on August 5, 1959, the company introduced a third sanding in the mill room, using a fine grained, 5/0, sand paper. When after this change it became clear that satisfactory quality had been attained and that no further changes in methods would be adopted at any early date, the company again adjusted the sanders' standards on the grounds that this added machine sanding had reduced the work being done by them.

The union objected to this increase in the standard, asserting that their work had been increased rather than diminished. There is, they assert, as much area to be sanded as there was before the third sanding operation was introduced in the mill room and more labor is involved in the sanding. At about the time the company introduced this third sanding, it also began repair of defective posts before they reached the sanders' station by filling holes in the wood with putty. Formerly this repairing was done by inspectors after the posts had left the sanders' station. About one in four of all posts are repaired with putty, and the removing of excess putty and smoothing out of the repair work adds considerably to the sanders' work. No allowance was made in the standard for this added work. Thus, says the union, standards were increased from 40 to 50 per cent at a time when the job was being made more difficult.

In reply the company states:

1. Putty was always applied before the posts arrived at the sanders' station. As posts come from the mill room, they are then inspected. Those needing repairs are set aside. The others go to the assembly line. The posts which were set aside are repaired by filling holes with putty and then put into the assembly line. The sanders get the posts only after they have been assembled by inserting a head or

Intervenor's Exhibit 2

foot panel, as the case may be, between two head or foot posts.

2. The third machine sanding with 5/0 sand paper introduced on August 5, 1959 lightened the work of the sanders considerably. Following this change in the mill room standards remained unchanged until October 29, 1959. Thus for almost three months the sanders had the benefit of this improvement in method without any adjustment in the standard. The increase in their earnings is sufficient proof that their task had been lightened in a substantial degree.

Between March 4, 1959, and July 7, 1959, (that is, before introduction of the third machine sanding) Mrs. Green and Mrs. Christian, two regular hand sanders, worked on the posts in question on 14 days. During this period they worked on these posts a total of 101.6 hours and earned 151.03 hours. For this work their earnings were 149 per cent of standard.

As stated above, the third machine sanding was introduced on August 5, 1959; standards were not adjusted until October 25, 1959. On twelve days from August 21 to October 15, 1959, the same two sanders worked on these posts a total of 94.39 hours; they earned for this work a total of 170.87 hours. Their efficiency rating for this period was 181 per cent. Thus, after the introduction of the third machine sanding but before any corresponding adjustment in the sanders' rate, their earnings rose from 149 per cent to 181 per cent of standard.

3. The agreement requires rates to be set so as to enable operators with proper skill and effort to earn from 120 to 125 per cent of standard. Clearly an adjustment in the rate was justified.

The standards were adjusted on October 25, 1959. Earnings thereafter promptly fell to 98 per cent of standard, as

Intervenor's Exhibit 2

is shown by company Exhibit 3, covering the period from November 23 to December 23, 1959. Had the operators during this period worked with the efficiency which characterized their production before the change in the standard they would have earned well in excess of the goal which the contract establishes for incentive standards, that is 120 to 125 per cent of standard. The new standards applied to the production which the operators achieved from August 21, 1959, to October 15, 1959, would have afforded earnings of 119.13 credit hours for the 86.39 clock hours worked on the posts in dispute during that period, that is, they would have achieved 138 per cent of standard.

Discussion of the Issue

The evidence seems conclusive that the introduction of the third machine sanding on or about August 5, 1959 reduced the work which machine sanders were required to do. The earnings of two experienced operators, Mrs. Green and Mrs. Christian went from a level of 149 per cent of standard for the period of March 4, 1959 to July 31, 1959, to a level of 181 per cent of standard in the period, August 21, 1959 to October 15, 1959. (See company Exhibits 1 and 2.) Some adjustment in the standard was clearly justified.

As stated, earnings of two experienced operators, Mrs. Green and Mrs. Christian averaged 149 per cent of standard for the period prior to the introduction of the third machine sanding. The standards on which these operators were working at that time had been in effect since September 25, 1958, that is for several months. Presumably these standards were mutually satisfactory and were set in accord with the terms of the contract. Since Exhibit 1 covers a fairly long period of time (from March 4, 1959, to August 31, 1959) and since it shows all the work for that period which was done by the two operators on the posts whose standards are in dispute, we may take the achieved level of earnings

Intervenor's Exhibit 2

as indicative of what these two experienced operators, working at their accustomed level of skill and efficiency, should earn for the work in question.

The union points out that in July, 1959, a change was made in the company's method of repairing which increased the work of the hand sanders by requiring them to smooth out and work over repairs made with putty. Company Exhibit 2 which covers a work period from August 21, 1959, to October 15, 1959, may be taken as representative of the level of production which these same two experienced operators can attain on the posts in the condition in which they are now received by the hand sanders. The beginning of this period is later than the date given by the union for the change in the method of repairing (that is the beginning of their difficulties with putty); it also follows the introduction of the third machine sanding. During this period, therefore, the sanders had to contend with whatever difficulties they now have from the putty; they also had whatever advantages were gained from the third sanding in the mill room.

If the level of production of these two experienced operators achieved during this period had yielded them a level of earnings of 149 per cent of efficiency, they would have enjoyed the same level of earnings they had been achieving before the most recent change in standard (October 25, 1959) and before the introduction of the third sanding in the millroom and before the alleged change in the method of repairing. The new standards applied to the level of production achieved between August 21, 1959, and October 15, 1959, would yield, however, not 149 per cent of standard, but 138 per cent, as is shown by company Exhibit 4. The arbitrator can only conclude that present standards (related to the present difficulty of the work) are 8 per cent low when compared to standard which existed from September 25, 1958, as it related to the difficulty of the work from that date until August 5, 1959, when the third sanding was

509a

Intervenor's Exhibit 3

introduced in the mill room. To be made comparable present standards should be increased by 8 per cent ($138 \times 108 = 149$).

AWARD

Present standards on the work under dispute shall be increased by 8 per cent.

Respectfully submitted,

LEO C. BROWN,
Arbitrator

Sep 30 1960
St. Louis, Missouri

Intervenor's Exhibit 3

Law Offices
BETHELL & PEARCE
107 Professional Life Building
Fort Smith, Arkansas

January 21, 1961

Father Leo C. Brown, S. J.
Institute of Social Order
3908 Westminster Place
St. Louis 8, Missouri

Re: Ballman-Cummings Furniture Company and United
Furniture Workers Local No. 270: Hearing
August 23, 1960 Opinion dated September 30, 1960

Dear Father Brown:

Immediately upon receipt of the award identified above
regarding hand sanders at Ballman-Cummings Furniture

Intervenor's Exhibit 3

Company, Mr. John G. Ayers asked that I write you regarding one aspect of your decision. Due to many pressures, I have not previously found occasion to comply with his request. I had hoped that we could discuss the matter with you and Mr. Raphael at the last arbitration in December, but Mr. Raphael's schedule was such that no time was available for this purpose. I trust that my delay in attending to Mr. Ayers' request will not create the impression that either he or I deem the matter of small consequence.

The case in question arose from a grievance filed by hand sanders after the Company adjusted the standard for incentive earnings following certain changes in methods and processes used in the work. The award held that the changes in the process warranted a revision of the standard. The evidence presented at the hearing conclusively demonstrated, and it was found in the award, that the standard as revised enabled the employees to make at least 138% of standard.

However, it was further held that because for a period of time before the introduction of the final change in process the employees in question had achieved 149% on the old standard, that the revision by the Company should be adjusted upward so that at the same level of effort as was expended August 21, 1959, through October 15, 1959, the employees could earn 149% of standard.

The Company respectfully submits that the portion of the award directing the Company to increase this standard eight per cent so that the employees might earn 149% of standard is in patent conflict with two contractual provisions governing the rights of these parties, and has no basis for support in any agreement of the parties.

Article IX, Section 5 of the principal contract states:

"The arbitrator shall not have the power to add to or subtract from or change any of the terms of this Agreement."

Intervenor's Exhibit 3

The Stipulation, entered into between the parties specifically governing job evaluation and the incentive system used by this Company, provides in Part II, A, 1:

"The standards will be established at a level which will afford the opportunity to earn a bonus of from 20 to 25% on the average for incentive effort."

Also pertinent is Part II, B, 2, which provides in part:

"However, it is understood that from time to time particular jobs or operations may be temporarily suspended from the program when experience shows that restudy is necessary, or when methods, equipment, processes, products or materials are changed."

From the foregoing it will be seen that the Company's commitment does not go beyond an obligation to establish standards which will afford the opportunity to earn a bonus of from 20 to 25% on the average for incentive effort. It is also specifically provided that standards may be restudied and revised when experience shows such action to be necessary, or when methods, equipment, processes, etc., are changed. When such restudies are in order, the obligation of the Company does not go beyond the duty to set a standard which will afford the opportunity to earn the stated percentage above standard.

There is absolutely nothing in the Stipulation which requires that a level of earnings achieved with one process on one standard be repeated or perpetuated upon another item, or when a standard for the same item is restudied because of a change in method, process, etc.

If the fact that an employee achieves a certain level of earnings on a given item establishes a vested right that all further revisions of the standard must enable him to main-

Intervenor's Exhibit 3

tain the same level of earnings, then the contract contains language we have not found. Obviously, such an approach is impractical, for if the employee was not checked during the period taken as a base, who is to say, in evaluating a later revision, whether he is working at the same pace as he was during the base period.

Furthermore, if an employee is entitled to have a level of earnings above the contractual commitment perpetuated on one item, why is he not entitled to the same level of earnings on other items he processes? If the employees in question are entitled to have preserved a standard which will assure them the chance to earn 149%, why are not all other employees in the shop entitled to have their standards similarly revised?

In revising other standards, what period of time should the Company use as a basis for determining the level of earnings which the employee is entitled to enjoy? For example, with regard to the present grievance, the Company might in the future choose to take the period illustrated in Company's Exhibit 3. This Exhibit shows that for a period covering 84.5 working hours (compared to a period of 101.6 hours in the period used in the award) the same employees enjoyed an earnings level of 98%. Is there any legal reason why the Company should not in the future use this period of experience as a measure of the level of earnings these employees are entitled to enjoy? What distinguishes it, contractually, from the period selected by the arbitrator to represent what these same two experienced operators should earn for the work in question?

The award calls attention to no provision of the Stipulation to support the conclusion. The discussion states a "presumption" that the standard in effect when the grievants earned 149% was "mutually satisfactory" and was set in accord with the terms of the contract. The discussion states that the achieved level of earnings for the period covering 101.6 hours is taken as what the employees "should earn" for the work in question.

Intervenor's Exhibit 3

We respectfully take issue not only with the accuracy of these presumptions, but also with their validity as a premise in support of the conclusion reached. The opinion itself reflects that the experience of the Company with the item in question was unsatisfactory from the time it was introduced until the second sanding with 5/0 paper was commenced in August, 1959. The standard which is presumed to be "mutually satisfactory" was set on a process which was discarded, or rather revised, because it was unsatisfactory. Furthermore, it is well known as a practical matter, either party may tolerate for a wide variety of reasons a given standard which is not particularly satisfactory. In this particular case, we find very little, if any, basis for saying that the standard in issue was "mutually satisfactory" during the period from March through July, but even if it be assumed that such was true, it does not follow that earnings achieved on such a standard establish a floor for the future.

From the premise that the standard was "mutually satisfactory", it is concluded that the average level of earnings during this period is what an experienced operator "should earn for the work in question". We submit that there is nothing whatever in the contract, nor was there any evidence of any past practice offered, to establish or support the principle that an employee "should" be entitled to any particular level of earnings. The Stipulation expressly commits the Company to establish standards which will afford its employees the *opportunity* to earn, with incentive effort, 120 to 125% on the average of their base rates. There is not a scintilla of evidence or contractual language that employees who, for whatever reason, manage to earn more than this are entitled forevermore to have standards set to preserve the higher level of earnings.

On the contrary, the principle that standards must be set to maintain past average earnings was the main motivating factor in causing the management of this Company to

Intervenor's Exhibit 3

spend thousands of dollars on an engineering program to establish the present incentive system. It was installed to replace a piece work system which had been used at Fort Smith Chair Company because the vicious cycle of constantly pyramiding labor costs arising from the demand that past average earnings be maintained had increased rates in certain classifications to a point at which they had become prohibitive.

Now this same principle is about to be re-introduced via an arbitration award. We feel that the arbitrator would not knowingly and deliberately add to the existing agreement of the parties a provision so intolerable to economic operation that the Company spent large sums of money quite recently to renounce it. The effect of the award, as it presently stands, in principle, would make the present incentive system completely unacceptable to the Company, and will inevitably lead to its abolition at the first opportunity.

We trust that when the arbitrator realizes the far-reaching implications of this award, that he will agree that it is in order to reconsider it.

Respectfully submitted,

Bethell & Pearce,
EDGAR E. BETHELL

EEB/sm

cc: Mr. Martin Raphael
Mr. Louie Campbell
Mr. John Ayers

Intervenor's Exhibit 4

Law Offices
BETHELL & PEARCE
107 Professional Life Building
Fort Smith, Arkansas

April 14, 1961

Father Leo C. Brown, S. J.
Institute of Social Order
3908 Westminster Place
St. Louis 8, Missouri

Re: Ballman-Cummings Furniture Company and
United Furniture Workers Local 270: Hearing
August 23, 1960, Opinion dated September 30,
1960

Dear Father Brown:

You will recall that when you were in Fort Smith for the last arbitration hearing, we mentioned to you that we felt that a review of your opinion under date of September 30, 1960, dealing with a grievance regarding the standard on hand sanding was in order. Because Mr. Raphael had to catch a plane, we were unable to go into the matter at that time. Thereafter, on January 21, 1961, I wrote you at length regarding this problem and setting forth the company's position with respect to your award.

We have had no answer to our letter, and the company has taken no action to carry out your award pending receipt of your response to our request for a modification.

Mr. Louie Campbell now advises us that it is his opinion that there is a danger of a strike at Ballman-Cummings if some action is not taken with respect to this award. While we feel that there is no basis for any such action on the part of the employees at Ballman-Cummings, in that we

Intervenor's Exhibit 4

have not declined to comply with the award, but have merely requested a reconsideration by the Arbitrator, nonetheless we have no desire to see a situation arise where we would be compelled to stand upon our legal rights in reference to the tenure of employment under such circumstances.

We urgently request that you endeavor to find time to give consideration to this problem at a very early date. In spite of the delays which have attended presentation of the question to you, and your response, the company deems this question to be one of major importance which attacks the fundamental basis upon which its incentive system is founded.

Thanking you for your early action on this matter, we are

Sincerely yours,

BETHELL & PEARCE.
EDGAR E. BETHELL.

EEB/sm

cc: MR. MARTIN RAPHAEL
MR. LOUIE CAMPBELL
MR. JOHN AYERS

Intervenor's Exhibit 5

INSTITUTE OF SOCIAL ORDER
3908 Westminster Place
Saint Louis 8, Missouri

July 15, 1961

Mr. Edgar E. Bethell
Bethell and Pearce
107 Professional Life Bldg.
Fort Smith, Arkansas

Re: Ballman-Cummings Furniture Company and
United Furniture Workers, Local 270 Sanding
Grievance

Dear Mr. Bethell:

On January 21, 1961, you wrote me, requesting reconsideration of my award on the above-titled case, and made the following points:

1. The arbitrator modified the agreement—a thing which the agreement explicitly forbids—by requiring the company to set production standards which will yield earning at 149 per cent of the base rate, whereas the Stipulation (which is part of the agreement) requires only that the production standards will afford opportunity of earning a bonus of 20 to 25 per cent.

2. The choice of the period, March 4, 1959, to July 7, 1959, for establishing a level of earnings—is arbitrary (a period of lower earnings could be chosen with equal logic) and is based on the false assumption that the standards used during the period were mutually satisfactory.

3. The arbitrator's approach is impractical. It cannot be assumed that the working pace during the base period

Intervenor's Exhibit 5

and during the revision period were identical. Yet this is an assumption underlying the award.

The arbitrator respectfully submits that his award does not modify the agreement. The Stipulation provides, it is true, that standards will be established which will afford an opportunity to earn a bonus of from 20 to 25 per cent on the average for incentive effort. This provision, however, does not mean that earnings of 20 to 25 per cent above standard are unchallengable evidence that a standard is proper.

This provision relating to an opportunity to earn 20 to 25 per cent on the average follows language which states that operators differ in ability and that earnings of individuals will vary. If a standard affords a group of operators opportunity to earn an average bonus of 20 to 25 per cent; it will afford the more efficient operators opportunity to earn in excess of 25 per cent. This is not only an obviously reasonable conclusion, but is clearly implied by the Stipulation.

The two workers, Green and Christian, from March 4, 1959, to July 7, 1959, (that is prior to the last change in the operation and after standards had already been adjusted upward to correspond to the lightening of work which occurred on or before September 25, 1958) earned an average of 149 per cent. The arbitrator regarded this historical level of earnings as evidence that Green and Christian *on the operation in question* were above-average operators.

This conclusion was premised on the assumption (more accurately, a finding) that the standards at the time were mutually satisfactory. The record justifies that finding. The company established the standards in question on September 25, 1958. From that date until July 7, 1959 (the end of the period March 4, 1959, to July 7, 1959) there was

Intervenor's Exhibit 5

no change in the operation. Since the company established the standards, it is reasonable to conclude that they were established in accord with normal practice and were satisfactory to the company. Since the union did not protest them, we can reasonably conclude that the union found them satisfactory. The arbitrator does not agree that the record shows dissatisfaction with the standards during this period. What the record does show is dissatisfaction with the quality of the product, which is an entirely different matter.

The arbitrator's basic premise in his award was: The average skill and effort which Green and Christian used between March 4, 1959, and July 7, 1959, in earning an average of 149 per cent of standard on the operation, should continue to earn them 149 per cent. This premise can be attacked only by asserting that the standards which existed at the time were lax. There is nothing in the record which would support such an assertion.

In addition to the above-stated premise the arbitrator made one basic assumption: The skill and effort of Green and Christian between August 21, 1959, and October 15, 1959, when they earned 181 per cent of standard on this operation, was at least as high as their skill and effort between March 4, 1949, and July 7, 1959, when they were earning an average of 149 per cent. The reasons for choosing these two periods are the following: (1) The first of the two periods preceded by a very short time the introduction of the third sanding in the mill room; the second period followed that change by a very short interval. (2) No controversy had as yet arisen among the operators about changed standards, because the standards had not as yet been changed. (3) There is every reason therefor to assume that the work pace between the periods was unchanged. The assumption that the two workers used the

Intervenor's Exhibit 5

same skill during the two periods cannot seriously be questioned. There is no reason to assume that they lost part of their skill between July and August of 1959.

The important question is whether in earning the higher average during the second period they actually expended less effort. What would cause them to slack off in their work? The higher earnings should have offered even greater incentive. If it is suggested that the prospect of a future adjustment in rates caused the operators to work with less efficiency than normal to make a case against a revision of the standard, we must admit that they went about it in a very inept fashion. Their production was so high that it demonstrated the propriety of an adjustment in the standard. The arbitrator remains persuaded that his basic assumption is sound and that Green and Christian continued to work with their accustomed efficiency from August 21, 1959, to October 15, 1959.

It is important here to point out that the arbitrator has not said that the earnings level of 149 per cent is sacrosanct and must be protected. He has said that standards should be set in such a way that the level of skill and effort which the operators displayed between August 21, 1959, and October 15, 1959 (when they earned 181 per cent on the unchanged standard) should earn them 149 per cent after the standard is adjusted. The only assumption here involved is that the operators between August 21, 1959, and October 15, 1959, worked with the same average efficiency that they displayed during the earlier period when they earned 149 per cent of standard. The arbitrator regards this assumption as a reasonably sound inference from the record.

It might be observed that the assumption is as defensible as the one made by the company. In adjusting standards the company subtracted from the time allowances which were in effect prior to October 29, 1959, the machine-process time used in the mill room for the third sanding. This was

Intervenor's Exhibit 5

not an unreasonable approach to the problem. The fact that the arbitrator has required an adjustment of only eight per cent in rates so established indicates that he found the method followed by the company's engineers basically sound. Nevertheless it is important to point out that the company's results were not achieved by a direct application of time study or of methods analysis. They were achieved by assuming that the workers would require less time on the operation by precisely the amount of time used by the machine in the mill room for the third sanding. The approach could have results which were somewhat over-generous to the employee it could have been somewhat unfair. Whether one or the other could be determined only by experience. The arbitrator found the standards fundamentally sound, but about eight per cent high.

On reflection the arbitrator concludes that his award did not modify the agreement, was sound, and should stand.

Very truly yours,

LEO C. BROWN,
Arbitrator.

cc: MR. LOUIE CAMPBELL
Business Representative
Local 270, United Furniture Workers
923½ Garrison Avenue
Fort Smith, Arkansas

MR. MARTIN RAPHAEL
165 Broadway
New York 6, New York

Intervenor's Exhibit 6

The strikers of the Ft. Smith Chair Company welcome this opportunity to explain our case to our fellow-citizens of this area.

We believe that all of the people, business men and storekeepers, as well as factory workers and the general public, have a very definite interest in the outcome of this strike. If the Chair Company should destroy our wage-standards, all other companies in this area would get the green-light to do likewise, and the loss of purchasing power would mean less business and less profits to the storekeepers and businessmen. Such a general offensive by the employers could lead to such industrial unrest that other industries might hesitate before locating in this area.

The facts of this strike are very simple. Our contract expired on May 31. Because of the Company saying they were losing money, we offered to renew our contract for another year, without any wage increase, so that the Company could improve its financial position. The Company rejected our generous offer, and instead, they proposed that we agree to a change in the contract that could have meant wage-cuts of 50¢ per hour, or \$20.00 per week for many of our members. Obviously, we could not agree to this and so the strike took place.

June 1, 1961, the workers came out 100% and are still out 100%. They are walking the picket line around the clock, trying to maintain wages and better working conditions for all working people in the Ft. Smith area.

This is your fight, and my fight to keep decent wages in Arkansas.

Why should our people have to go to California to receive good wages and working conditions?

Fort Smith needs skilled Furniture Workers like the Chair Company strikers. Fort Smith also needs the weekly pay-roll the Chair Company workers are fighting for.

Intervenor's Exhibit 7

Let's see to it that the Chair Company strikers win. . . .
If they win. . . . Fort Smith wins. . . .

UFWA-AFL-CIO

LOCAL # 270

LOUIE CAMPBELL,

Bus. Rep.

Intervenor's Exhibit 7

We the strikers of the Fort Smith Chair Company, now on our seventh week of strike, take this opportunity to appeal to you to honor our picket lines. We ask you to do this because we know that many of you would not have answered the Company advertisement if you had known that we were on strike.

We know therefore that you were misled by the Company and so we ask you not to cross our lines.

The facts of this strike are very simple. Many of us have worked for this Company for more than twenty years. We have spent the best years of our lives here and we certainly would not be on strike if we could have avoided it. We offered to renew our contract without a wage increase so that the Company's financial position could be improved during the coming year. Our generous offer was rejected and instead the Company wanted us to agree to a change in the contract language which could have meant hourly wage cuts of 50¢ per hour, or \$20.00 per week for many of our members. Obviously we could not agree to this and so the strike took place.

These are the facts and the Company doesn't deny them. Instead of negotiating with us and working out our differences they try to use you to break our strike and they are

Intervenor's Exhibit 8

not concerned with the fact that they make you a strike-breaker, a name that you, and not they, have to live with for the rest of your life.

Many of you are younger people just starting out in life. You will probably work in many other jobs and meet many other workers. Do not let this Company make a strike-breaker out of you.

Many of you are students, high-school or college, and certainly this is no way for a student to begin his career. An intelligent high school or college student doesn't have to take the food from the mouths of our children. Your conscience will not allow you to forget it if you do.

Do your part to have a better standard of living for all American workers, by not crossing our picket lines. . . .

LOCAL 270, UNITED FURNITURE WORKERS
OF AMERICA AFL-CIO

Intervenor's Exhibit 8

TO THE WORKING PEOPLE OF FORT SMITH

We the strikers of the Fort Smith Chair Company, on our seventh week of strike, take this opportunity to appeal to you to honor our picket lines.

The facts of this strike are very simple. Many of us have worked for this Company for more than twenty years. We have spent the best years of our lives here, and we certainly would not be on strike if we could have avoided it. We offered to renew our contract without a wage increase so that the Company's financial position could be improved during the coming year. Our generous offer was rejected and instead, the Company wanted us to agree to a change in the contract language which could have meant hourly wage

Intervenor's Exhibit 11

cuts of 50¢ per hour, or \$20.00 per week for many of our members. Obviously, we could not agree to this and so the strike took place.

These are the facts, and the Company doesn't deny them. Instead of negotiating with us and working out our differences, they are trying to break our strike, and they are not concerned with the fact that this would hurt all the people of Fort Smith.

Many of you are younger people just starting out in life. You will probably work in many other jobs and meet many other workers. Do not let this Company use you to hurt your fellow citizens that are on strike.

Do your part to have a better standard of living for all American workers, by not crossing our picket lines. . . .

LOCAL #270, UNITED FUNITURE WORKERS
OF AMERICA

Intervenor's Exhibit 11

The strikers of the Ft. Smith Chair Company welcome this opportunity to explain our case to our fellow-citizens of this area.

We believe that all of the people, business men and the storekeepers, as well as factory workers and the general public, have a very definite interest in the outcome of this strike. If the Chair Company should destroy our wage-standards, all other companies in this area would get the green light to do likewise and the loss of purchasing power would mean less business and less profits to the storekeepers and businessmen. Such a general offensive by the employers could lead to such industrial unrest that other industries might hesitate before locating in this area.

Intervenor's Exhibit 11

The facts of this strike are very simple. Our contract expired on May 31. Because of the Company saying they were losing money, we offered to renew our contract for another year, without any wage increase, so that the Company could improve its financial position. The Company rejected our generous offer, and instead, they proposed that we agree to a change in the contract that could have meant wage-cuts of 50¢ per hour, or \$20.00 per week for many of our members. Obviously, we could not agree to this and so the strike took place.

June 1, 1961, the workers came out 100% and are still out. They are walking the picket line around the clock, trying to maintain wages and better working conditions for all working people in the Ft. Smith area.

This is your fight, and my fight to keep decent wages in Arkansas.

Why should our people have to go to California to receive good wages and working conditions?

Fort Smith needs skilled Furniture Workers like the Chair Company strikers. Fort Smith also needs the weekly pay-roll the Chair Company workers are fighting for.

Let's see to it that the Chair Company strikers win . . . If they win . . . Fort Smith wins. . . .

UNITED FURNITURE WORKERS OF AMERICA

LOCAL NO. 270

AFL-CIO

LOUIE CAMPBELL

Business Representative

**General Counsel's Exceptions to the
Intermediate Report**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Twenty-sixth Region

[SAME TITLE]

Now comes the General Counsel for the National Labor Relations Board and excepts to the Intermediate Report herein in the following particulars:

1.

The failure of the Trial Examiner to make a finding and conclusion based upon the uncontroverted testimony of John Ayers, the Respondent's secretary and treasurer, that the reason the Respondent discharged the 186 discriminatees in the instant case was because it wanted to purge itself of the Union.

2.

The failure to find and conclude that even if the notice requirements of Section 8(d) were applicable to the strike in the instant case; nevertheless under the circumstances present in the instant case, the failure of the Union to serve the notices described in 8(d)(3) would not have resulted in the loss of employee status penalty of Section 8(d) applying to the employees participating in the strike.

Dated at Memphis, Tennessee, this 15th day of June 1962.

WILLIAM E. STATHAM,
Counsel for the General Counsel.

**Respondent's Statement of Exceptions to the
Intermediate Report**

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

[SAME TITLE]

Comes now the Respondent, and files the following exceptions to the findings and conclusions of the Trial Examiner in his Intermediate Report in the above entitled matter. Respondent excepts as follows:

I.

To the failure of the Trial Examiner to find that the Union took the position that all of its bargaining concessions were withdrawn if the membership did not accept the Respondent's proposal of May 31, 1961. (5 IR 59-63)

II.

To the failure of the Trial Examiner to find that on June 1, 1961, Respondent's plant was open and ready to operate. (5 IR 5)

III.

To the failure of the Trial Examiner to find that there was no suggestion or threat by Respondent that there would be any change in rates of pay or working conditions in the event its employees returned to work on June 1, 1961, without reaching agreement on a contract. (5 IR 5)

*Respondent's Statement of Exceptions to the
Intermediate Report*

IV.

To the failure of the Trial Examiner to find that there was no lock-out of its employees by the Respondent on or after June 1, 1961. (5 IR 5)

V.

To the failure of the Trial Examiner to find that the Union had and followed in this instance a policy of "no contract, no work." (5 IR 5)

VI.

To the failure of the Trial Examiner to note that the Respondent participated in the meeting on June 7, 1961, under a reservation of its rights in the event it should be found that the Union had not complied with Section 8(d) (3). (5 IR 6)

VII.

To the finding of the Trial Examiner that the attorney for the Respondent learned for the first time at the meeting on June 7, 1961, that the notice required by Section 8 (d) (3) had not been received by the appropriate agencies. (5 IR 18).

VIII.

To the failure of the Trial Examiner to find that changes made by Respondent in its wage structure and incentive system after June 13, 1961, were consistent with its offers and proposals to the Union in the course of negotiations, and did not constitute more favorable terms or conditions to its employees than had prevailed prior to June 1, 1961. (5 IR 45-7)

*Respondent's Statement of Exceptions to the
Intermediate Report*

IX.

To the finding of the Trial Examiner that at the conclusion of the meeting on May 31, 1961, the Respondent was insisting upon a restriction against holding grievance meetings during working time. (6 IR 35)

X.

To the finding of the Trial Examiner that the Respondent's so-called "no vested rights" clause would have materially altered the contract. (6 IR 43-5)

XI.

To the conclusion of the Trial Examiner that the purpose of the strike from its inception was to force the Respondent to abandon its insistence upon substantial changes in the contract. (7 IR 8-11)

XII.

To the finding of the Trial Examiner that it was the Respondent, rather than the Union, which was bent upon modifying the old contract. (7 IR 14-15)

XIII.

To the finding of the Trial Examiner that the Respondent unilaterally modified any agreement after June 13, 1961. (7 IR 15-16)

XIV.

To the failure of the Trial Examiner to find that the Union was the party desiring termination or modification of the contract. (7 IR 16, 60)

*Respondent's Statement of Exceptions to the
Intermediate Report*

XV.

To the conclusion of the Trial Examiner that the notice requirement of Sections 8(d)(1) and (3) do not apply to this economic strike. (8 IR 3-4)

XVI.

To the conclusion of the Trial Examiner that the object of the strike was not to terminate or modify the contract. (8 IR 15-16)

XVII.

To the conclusion of the Trial Examiner that the loss-of-status provision of Section 8(d) does not apply to the strikers in this case. (8 IR 16-17)

XVIII.

To the conclusion of the Trial Examiner that the strikers were engaged in a lawful economic strike. (8 IR 17-19)

XIX.

To the conclusion of the Trial Examiner that it was a violation of Section 8(a)(1) and (3) of the Act for the Respondent to discharge the strikers. (8 IR 19 et seq.)

XX.

To the conclusion of the Trial Examiner that the strike was converted from an economic strike into an unfair labor practice strike. (8 IR 22-4)

XXI.

To the conclusion of the Trial Examiner that the Union never lost its majority status after May 31, 1961. (8 IR 50)

*Respondent's Statement of Exceptions to the
Intermediate Report*

XXII.

To the conclusion of the Trial Examiner that the Respondent violated Sections 8(a)(1) and (5) of the Act. (9 IR 12-16)

XXIII.

To the Conclusion of Law No. 4. (9 IR 36 et seq.)

XXIV.

To the Conclusion of Law No. 5. (9 IR 41 et seq.)

XXV.

To the Conclusion of Law No. 6. (10 IR 1 et seq.)

XXVI.

To the Conclusion of Law No. 7. (10 IR 7 et seq.)

XXVII.

To the Conclusion of Law No. 8. (10 IR 12 et seq.)

XXVIII.

To the Recommendations of the Trial Examiner in their entirety. (10 IR 24 et seq.)

XXIX.

To the failure of the Trial Examiner to find that the Union was obliged to comply with the requirements of Section 8(d) of the Act, and that it failed to do so.

XXX.

To the failure of the Trial Examiner to find that the strike of Respondent's employees was "unprotected" activity under the Act.

*Respondent's Statement of Exceptions to the
Intermediate Report*

XXXI.

To the failure of the Trial Examiner to find that the Respondent's employees lost their status as such when they struck on June 1, 1961, without having complied with the requirements of Section 8(d).

Respectfully submitted this 15th day of June, 1962.

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62
**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17961

**UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,
AND LOCAL 270, UNITED FURNITURE WORKERS OF
AMERICA, AFL-CIO, PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**On Petition To Review and Modify An Order
of the National Labor Relations Board**

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STATEMENT OF QUESTIONS PRESENTED

The questions presented are correctly stated on the flyleaf of petitioners' brief, and appear on page 2a of the Joint Appendix.

III

INDEX

	Page
Statement of Questions Presented.....	(i)
Counterstatement of the Case.....	1
I. The Board's findings of fact.....	2
A. Background.....	2
B. Bargaining negotiations before the 1961 strike.....	3
1. The Union's 60-day notice of a desire to terminate the existing contract.....	3
2. The bargaining positions of the parties..	4
3. Negotiations just before the strike....	8
C. The strike; the negotiations after the strike began; the discharge of the strikers after the Company learned that the strike constituted an unfair labor practice by the Union.....	10
II. The Board's conclusions of law and its order....	14
Summary of Argument.....	16
Argument	18
The Board properly found that the Company did not violate the Act by discharging the strikers thereafter withdrawing recognition from the Union.....	18
A. Introduction: the issue defined.....	18
B. The Board properly found that the strike herein constituted a violation of Section 8(d) (4) on the part of the Union.....	19
C. The Board properly found that the Company did not violate the Act by discharging the strikers because of their participation in the strike.....	33
1. Participation in the strike deprived the strikers of their employee status..	33

Argument—Continued	Page
2. Strike participation was in any event an unprotected activity, for which the strikers could be discharged, because the strike constituted a union unfair labor practice.....	42
Conclusion.....	50

AUTHORITIES CITED

Cases:

<i>American Rubber Products Corp. v. N.L.R.B.</i> , 214 F. 2d 47 (C.A. 7).....	44
<i>Baldwin v. Fidelity Phenix Life Ins. Co. of N.Y.</i> , 260 F. 2d 951 (C.A. 6).....	21
<i>Biazevich, et al. d/b/a MV Liberator</i> , 136 NLRB 13.....	26
* <i>Boeing Airplane Co. v. N.L.R.B.</i> , 85 App. D.C. 116, 174 F. 2d 988.....	18, 29, 34, 47, 48
<i>Brotherhood of Locomotive Firemen & Enginemen (Phelps Dodge Corp.)</i> , 130 NLRB 1147, set aside, 302 F. 2d 198 (C.A. 9).....	42
<i>Burstein v. United States</i> , 232 F. 2d 19 (C.A. 8).....	48
<i>Cleaver-Brooks Mfg. Corp. v. N.L.R.B.</i> , 264 F. 2d 637 (C.A. 7), cert. denied, 361 U.S. 817.....	45
<i>Conway v. First Nat'l. Bank</i> , 256 F. 277 (C.A. 5).....	21
<i>Cupples Co. Mfrs. v. N.L.R.B.</i> , 106 F. 2d 100 (C.A. 8).....	48
<i>Division 1142, Amalgamated Assoc. of St., Elec. Ry. and Motor Coach Emp. of America, AFL-CIO v. N.L.R.B.</i> , 111 App. D.C. 280, 294 F. 2d 264.....	27
<i>East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO v. N.L.R.B.</i> , — App. D.C. —, 322 F. 2d 411.....	36
<i>Graham v. Boeing Airplane Co.</i> , 22 LRRM 2343, 15 L.C. para. 64,604 (D.C. Wash., June 19 & 22, 1948).....	36

* Authorities chiefly relied upon.

Cases—Continued

Page

<i>Haldone v. United States</i> , 69 F. 819 (C.A. 8).....	21
<i>Harnischfeger Corp. v. N.L.R.B.</i> , 207 F. 2d 575 (C.A. 7)	44
<i>Hoover Co. v. N.L.R.B.</i> , 191 F. 2d 380 (C.A. 6)....	44
<i>Int'l. Assoc. of Machinists v. N.L.R.B.</i> , 71 App. D.C., 110 F. 2d 29, aff'd., 311 U.S. 72.....	28
<i>Int'l. Bro. of Operative Potters v. N.L.R.B.</i> , — App. D.C. —, 320 F. 2d 757.....	28
<i>Int'l. Ladies' Garment Workers' Un. v. N.L.R.B.</i> , 99 App. D.C. 64, 237 F. 2d 545.....	46
* <i>Int'l. Union UAW, AFL, Loc. 232 v. Wisconsin Empl. Relations Board</i> , 336 U.S. 245.....	44, 45
* <i>International Union of Operating Engineers, Local No. 181 v. Dahlem Construction Co.</i> , 193 F.2d 470 (C.A. 6).....	21
<i>Joy Silk Mills v. N.L.R.B.</i> , 87 App. D.C. 360, 185 F. 2d 732, cert. den., 341 U.S. 914.....	28
<i>Leterman, Becher & Co., Inc.</i> , 260 F. 543 (C.A. 2), cert. den., 250 U.S. 688.....	20-21
<i>Lion Oil Co. v. N.L.R.B.</i> , 221 F. 2d 231 (C.A. 8), revsd. and remanded 352 U.S. 282.....	34, 47
<i>Local No. 3, United Packinghouse Workers of America, CIO v. N.L.R.B.</i> , 210 F. 2d 325 (C.A. 8), cert. den., 348 U.S. 822, 352 U.S. 282.....	34, 47
<i>Local 174 v. Lucas Flour Co.</i> , 369 U.S. 95.....	45
<i>Local 833, UAW, AFL-CIO</i> , 112 App. D.C. 107, 300 F. 2d 699, cert. den., 370 U.S. 911.....	26, 43
* <i>Local Union 219, Retail Clerks Int'l. Assoc. AFL- CIO v. N.L.R.B.</i> , 105 App. D.C. 232, 265 F. 2d 814.....	16, 17, 26, 29, 35, 36, 38, 49
* <i>Local Union No. 1229, Int'l. Bro. of Elec. Wkrs. AFL v. N.L.R.B.</i> , 91 App. D.C. 333, 202 F. 2d 186, reversed, 346 U.S. 464.....	42, 46
<i>Los Angeles Mailers' Union No. 9 v. N.L.R.B.</i> , 114 App. D.C. 72, 311 F. 2d 121.....	49
<i>Mastro Plastics Corp. v. N.L.R.B.</i> , 350 U.S. 270, aff'g. 214 F. 2d 462 (C.A. 2).....	26, 33, 34, 35, 36, 47
<i>Metal Blast, Inc. v. N.L.R.B.</i> , 324 F. 2d 602 (C.A. 6).....	47

* Authorities chiefly relied upon.

Cases—Continued

	Page
<i>Mrs. Fay's Pies, Inc.</i> , 145 NLRB No. 48.....	26, 33
<i>Nat'l. Gypsum Co.</i> , 133 NLRB 1492.....	48
<i>N.L.R.B. v. American National Insurance Co.</i> , 343 U.S. 395	27
<i>N.L.R.B. v. Central Illinois Public Service Co.</i> , 54 LRRM 2586, 48 L.C. para. 18,592 (C.A. 7, Nov. 20, 1963).....	36
<i>N.L.R.B. v. Coal Creek Coal Co.</i> , 204 F. 2d 579 (C.A. 10)	45, 47, 48
<i>N.L.R.B. v. Cone Bros. Contracting Co.</i> , 317 F. 2d 3 (C.A. 5), cert. den., December 9, 1963.....	47
* <i>N.L.R.B. v. Dallas General Drivers, Local Union 745</i> , 264 F. 2d 642 (C.A. 5), cert. den., 361 U.S. 814.....	43
<i>N.L.R.B. v. Draper Corp.</i> , 145 F. 2d 199 (C.A. 4).....	44
<i>N.L.R.B. v. Electronics Equipment Co.</i> , 205 F. 2d 296 (C.A. 2).....	44
<i>N.L.R.B. v. Erie Resistor Corp.</i> , 373 U.S. 221.....	40
<i>N.L.R.B. v. Fansteel Metallurgical Corp.</i> , 306 U.S. 240.....	44
<i>N.L.R.B. v. Indiana Desk Co.</i> , 149 F. 2d 987 (C.A. 7)	44
<i>N.L.R.B. v. Int'l. Rice Milling Co.</i> , 341 U.S. 665..	40
<i>N.L.R.B. v. Lion Oil Co.</i> , 352 U.S. 282.....	36, 40
<i>N.L.R.B. v. Marcus Trucking Co.</i> , 286 F. 2d 583 (C.A. 2)	36
<i>N.L.R.B. v. Mayer</i> , 196 F. 2d 286 (C.A. 5).....	27
<i>N.L.R.B. v. Norfolk Shipbuilding & Drydock Corp.</i> , 195 F. 2d 632 (C.A. 4).....	27
* <i>N.L.R.B. v. Puerto Rico Rayon Mills, Inc.</i> , 293 F. 2d 941 (C.A. 1).....	43
<i>N.L.R.B. v. Sands Mfg. Co.</i> , 306 U.S. 332.....	45
<i>N.L.R.B. v. Sunbeam Lighting Co.</i> , 318 F. 2d 661 (C.A. 7)	44
* <i>N.L.R.B. v. Thayer Co.</i> , 213 F. 2d 748 (C.A. 1), cert. den., 348 U.S. 883.....	43

* Authorities chiefly relied upon.

VII

Cases—Continued

Page

<i>N.L.R.B. v. Wagner Iron Works, Local 471 v. N.L.R.B.</i> , 220 F. 2d 126 (C.A. 7), cert. den., 350 U.S. 981.....	26, 34
<i>N.L.R.B. v. Wallick</i> , 198 F. 2d 477 (C.A. 3).....	47, 48
<i>N.L.R.B. v. Walton Mfg. Co.</i> , 369 U.S. 404.....	28
<i>N.L.R.B. v. Washington Aluminum Co.</i> , 370 U.S. 9.....	45
<i>N.L.R.B. v. Worcester Woolen Mills Corp.</i> , 170 F. 2d 13 (C.A. 1), cert. den., 336 U.S. 903.....	48
<i>Ohio Ferro-Alloys Corp. v. N.L.R.B.</i> , 213 F. 2d 464 (C.A. 6).....	44
<i>Old King Cole, Inc. v. N.L.R.B.</i> , 260 F. 2d 530 (C.A. 6).....	48
<i>O'Malley v. Yost</i> , 189 F. 2d 331 (C.A. 8).....	48
<i>Plasti-Line, Inc. v. N.L.R.B.</i> , 278 F. 2d 482 (C.A. 6).....	44
<i>Procter & Gamble Ind. Union of Port Ivory, N.Y. v. Procter & Gamble Mfg. Co.</i> , 312 F. 2d 181 (C.A. 2), cert. den., 374 U.S. 830.....	21
<i>Retail Clerks Int'l. Assoc., Local No. 1179, AFL</i> , 109 NLRB 754.....	40
<i>Ringling Bros. etc. v. Olvera</i> , 119 F. 2d 584 (C.A. 9).....	48
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236.....	33
* <i>Schneid v. District 50, UMW of America</i> , 40 LRRM 2529, 33 L.C. para. 70,885 (D.C.N.D.Ill., July 26, 1957).....	32
* <i>Simmons, Inc. v. N.L.R.B.</i> , 315 F. 2d 143 (C.A. 1).....	43, 46
<i>Southern Steamship Co. v. N.L.R.B.</i> , 316 U.S. 31.....	44
<i>Town & Country Mfg. Co. v. N.L.R.B.</i> , 316 F. 2d 846 (C.A. 5), enforcing 136 NLRB 1022.....	36
<i>Union Mfg. Co.</i> , 101 NLRB 1028, 107 NLRB 184, enf'd. 95 App. D.C. 252, 221 F. 2d 532, cert. den., 349 U.S. 921.....	48
* <i>United Elec., Radio & Mach. Workers of America, Local 1113 v. N.L.R.B.</i> , 96 App. D.C. 46, 223 F. 2d 338, cert. den., 350 U.S. 981..18, 32, 34, 38, 45, 47	

* Authorities chiefly relied upon.

VIII

Cases—Continued	Page
<i>United States v. 12,800 Acres of Land</i> , 69 F. Supp. 767 (D.C. Neb.).....	48
<i>Universal Camera Corp. v. N.L.R.B.</i> , 340 U.S. 474.....	28
<i>Warehousemen & Mail Order Emp., Local 743 v. N.L.R.B.</i> , 112 App. D.C. 280, 302 F. 2d 865.....	27
<i>Webster v. Fall</i> , 266 U.S. 507.....	42
<i>W. Wilton Wood, Inc.</i> , 127 NLRB 1675.....	48
Statutes:	
National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et seq.).....	2
Section 7	14
Section 8(a) (3)	2
Section 8(a) (5)	2
Section 8(b) (3)	19
Section 8(d)	2
Section 8(d) (1)	20
Section 8(d) (3)	10
Section 8(d) (4)	2
Section 10(c)	2
Section 10(e)	36
Section 10(f)	2
Section 10(j)	36
Section 13	40
Miscellaneous:	
93 Cong. Rec. 3835.....	40
93 Cong. Rec. 6442.....	44
Archibald Cox, <i>The Right to Engage in Concerted Activities</i> , 26 Ind. L.J. 319, 325 (1951).....	43
Federal Mediation and Conciliation Service, Tenth Annual Report, Fiscal Year 1957 (Govt. Print. Office), p. 5.....	25
House Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 59.....	44

* Authorities chiefly relied upon.

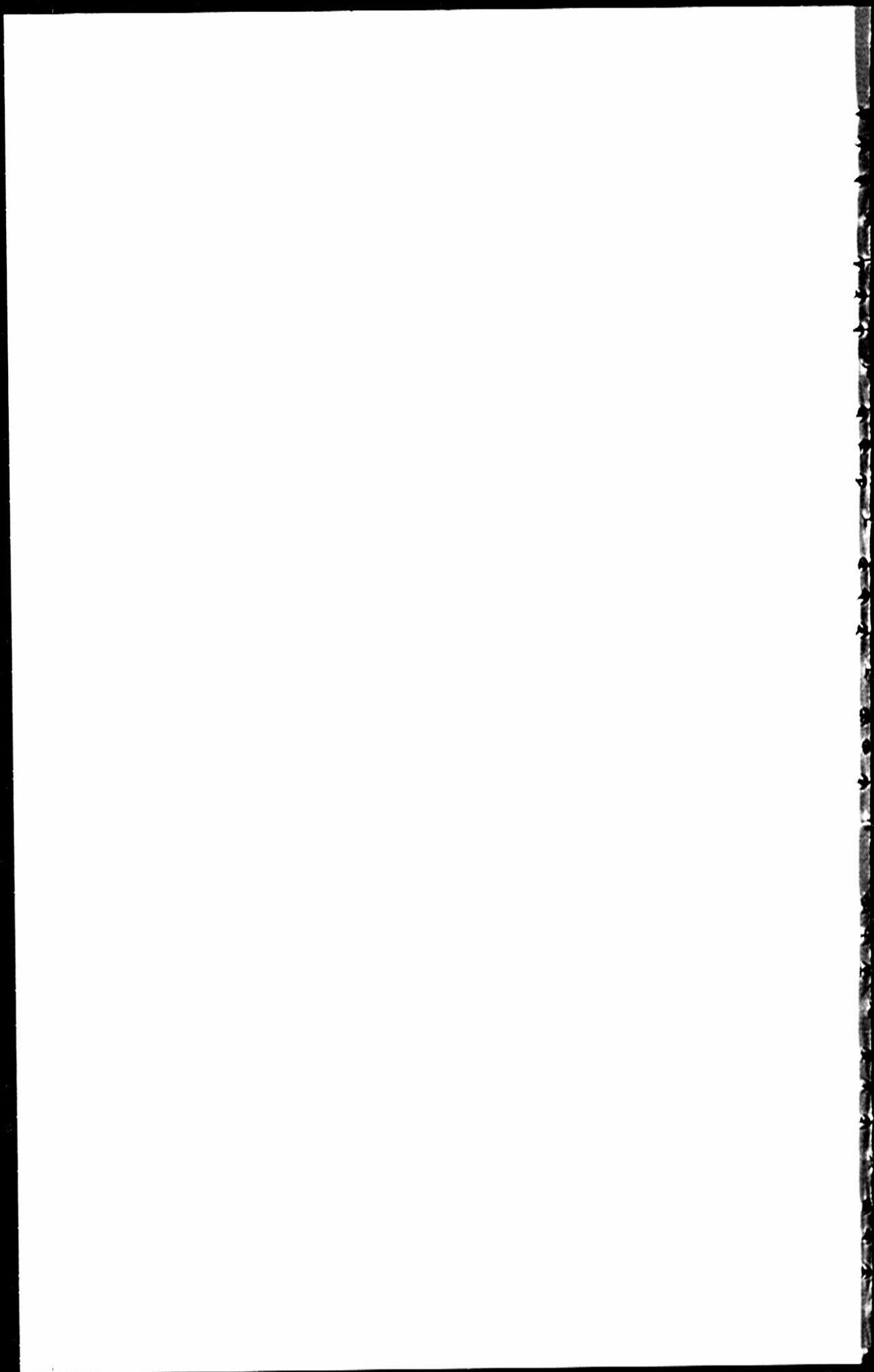
IX

Miscellaneous—Continued

Page

I Leg. Hist. of the LMRA 1947, p. 430 (Govt. Print. Office 1948).....	33
I Leg. Hist. 563.....	44
2 Leg. Hist. 1007.....	40
2 Leg. Hist. 1538-1539.....	44
S. Rept. No. 105 on S. 1126, 80th Cong., 1st Sess. p. 24	33
Wage Stabilization Act.....	44

* Authorities chiefly relied upon.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17961

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,
AND LOCAL 270, UNITED FURNITURE WORKERS OF
AMERICA, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**On Petition To Review and Modify An Order
of the National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

COUNTERSTATEMENT OF THE CASE

This case is before the Court on petition of the United Furniture Workers of America, AFL-CIO (herein called the International) and Local 270, United Furniture Workers of America, AFL-CIO (herein called the Local) to review and modify an order of the National Labor Relations Board, issued

on June 28, 1963, after the usual proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 541, 29 U.S.C. Sec. 151, *et seq.*), which dismissed a complaint issued against Fort Smith Chair Company (herein called the Company) based upon a charge filed by the Local. Petitioners herein are sometimes jointly referred to as the Union. The Board's Decision and Order (J.A. 18a-69a)¹ are reported at 143 NLRB No. 28. This Court has jurisdiction under Section 10(f) of the Act.

I. The Board's findings of fact

The Board found that the Company did not violate Section 8(a)(3) of the Act by discharging the participants in a strike, beginning on June 1, 1961, which the Union had called in violation of Section 8(d)(4). The Board further found that because the lawful discharge of the strikers had validly destroyed the Union's majority status, the Company did not violate Section 8(a)(5) by subsequently withdrawing recognition from the Union. Where the testimony was in conflict, the Board adopted the credibility resolutions of the Trial Examiner. The evidence upon which the Board based its findings is summarized below.

A. Background

Prior to the events in this case, the Company (a furniture manufacturer in Fort Smith, Arkansas) had had bargaining relations with the Union for over

¹ "J.A." references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

20 years (J.A. 19a, 42a; 450a, 80a). The Company had lost money during each of the last 4 years of this period (J.A. 45a; 346a, 337a). During this 4-year period, the employees' wages had increased by 24 percent, and the proportion of the Company's total costs which was represented by labor costs had increased by almost 30 percent (J.A. 337a, 338a-339a). During the period when the Company was losing money, the Union had never agreed to relinquish any concession previously obtained from the Company (J.A. 174a, 185a, 353a-354a).

B. *Bargaining negotiations before the 1961 strike*

1. *The Union's 60-day notice of a desire to terminate the existing contract*

The last collective bargaining agreement between the Company and the Union expired by its terms on June 1, 1961 (J.A. 19a; 86a). By letter dated March 27, 1961, the Union advised the Company (J.A. 19a-20a, 44a; 451a, 488a-489a, 80a):

On behalf of our organization, it is our desire to cancel the labor agreement between your Company, and our organization and to negotiate a new contract to take the place of the contract expiring June 1, 1961.

We herewith give you 60 days notice as provided in the Taft-Hartley Bill, and we also, herewith give you 60 days notice as provided for in * * * the existing labor contract between your Company and the [Union] that the Union will consider the contract as terminating on the date fixed herein for expiration namely June 1, 1961.

The Union will keep in effect the existing terms and conditions of employment until the expiration date of said contract, namely June 1, 1961.

* * * *

It is our hope that we will have no difficulty in reaching a new and modified agreement on wages and working conditions and other conditions of employment.

2. The bargaining positions of the parties

The parties held negotiating sessions on May 29 and 31, 1961 (J.A. 20a, 45a; 451a, 80a). The Union orally submitted proposals for a general wage increase; another paid holiday (Christmas Eve) in addition to the six paid holidays called for by the expiring contract; a provision that a supervisor who was performing production work for "experimental or development" purposes could make only one production unit; a provision permitting the presence of a union representative and of the employee affected when a foreman was testing a standard set for piecework; a provision for paying employees "base rate plus twenty per cent" on "drop numbers"—i.e., furniture styles no longer being made in regular production; additional restrictions (which the Union had previously sought on a number of occasions) on the Company's right to make reductions in force out of seniority;² and certain liberalizations on eligibility

² The expiring contract permitted such reductions where the amount of time involved was one day or less (J.A. 468a, 80a). The Union wanted a further provision that the time in question would have to fall within a single week (J.A. 89a).

for holiday pay, including an increase in the length of time during which an employee could be absent for certain reasons (such as illness) or tardy without forfeiting pay for a holiday falling immediately before or afterward, and a provision that an employee would not lose holiday pay because of absence (immediately before or after the holiday) due to the death of his father-in-law, mother-in-law, sister-in-law, or brother-in-law (J.A. 80a, 88a-90a, 92a, 122a, 247a, 468a, 471a-472a, 483a).

The Company, in turn, sought modifications in the contractual seniority clause (its proposed revision, however, still accepting seniority as a principal basis for determining the identity of employees to be laid off, recalled, or promoted); a requirement that employees notify the Company "as soon as practical" when they would be absent;³ a provision that frequent absences would be cause for discharge; modifications in the grievance and compulsory arbitration provisions,⁴ including a provision that all grievance meet-

³ Company Secretary-Treasurer Ayers testified, however, that there were no "teeth" in this proposal (J.A. 401a). Some employees were interpreting the contract as a "license" to be absent for 3 days without notice; and absences without notice were imposing substantial costs on the Company (J.A. 259a-261a, 339a-340a).

⁴ The expiring agreement named the arbitrator; the Company's proposal provided for selection of an arbitrator from a list provided by the Federal Mediation and Conciliation Service (J.A. 477a, 496a, 80a, 90a). The Company's proposal substituted, for a provision that grievances be submitted "promptly," a clause requiring most grievances to be submitted in writing within 10 days (J.A. 479a, 496a, 80a, 90a).

ings be held outside working hours;⁵ and modification of the method by which the Company was obligated to notify employees not to report to work, in order to avoid the obligation to give them 4 hours' pay when no work was available (J.A. 466a-469a, 476a-479a, 493a-496a, 80a, 90a, 240a-241a).⁶ The Company also sought changes in certain provisions regarding the determination of incentive pay (which changes, further discussed on pp. 22-26, *infra*, are referred to in the record as the "no vested rights" clause), including the addition of a provision that employees would be notified "of the standard time and/or pieces per hour required for standard" (J.A. 450a, 453a-463a, 80a, 90a, 240a-241a). The Company sought no changes in the provisions of the expiring agreement calling for a union shop,⁷ checkoff, top seniority for union stewards, leaves of absence to employees on the Union's payroll, bulletin boards for the Union's use, and a group insurance plan financed by company payments to the United Furniture Workers Insurance Fund (J.A. 464a-465a, 468a-469a, 479a, 482a-483a, 80a).

⁵ The provisions in the expiring agreement which called for meetings during paid working time (see p. 9, *infra*) had been imposing substantial costs on the Company (J.A. 262a, 339a).

⁶ The expiring contract provided for notice by mail to employees on layoff, leave of absence, or absent because of illness (J.A. 469a, 80a). The Company's proposal limited this clause to employees on layoff (J.A. 496a, 90a).

⁷ Union membership was not required, however, of presently employed employees who had never joined the Union.

The Company objected to the Union's "money demands"—i.e., wage increases and the additional paid holiday—on the ground that during the past four years, while the Company had been losing money and the percentage of its costs attributable to wages had been rising, the employees' wages had risen about 24 percent, about 5 times as much as the cost of living (J.A. 45a; 336a-337a, 338a-339a, 247a-248a, 281a). The Company also objected to the Union's proposed limitations on experimental production by supervisors, on the ground that "you couldn't experiment by making one unit," and that if the foreman engaged in production for purposes not permitted by the contract, the Union could take the matter up through the contractual grievance procedure (J.A. 234a). The Company stated that it was entirely willing to have the employee and the steward present while standard tests were being run, and to pay the employee his base rate for any time involved during regular working hours; but (the Company pointed out) most tests were run on Saturday or outside regular working hours (J.A. 234a). The Company contended that only the base rate should be paid on "drop numbers," because the employees were not working at an incentive pace on these items (J.A. 236a). The Company pointed out that it had repeatedly stated in the past its reasons for opposing the Union's proposed changes in the seniority clauses (J.A. 236a-237a). The Company also rejected most of the Union's proposed modifications of the holiday pay clause, on the ground that so far as it knew, no employee had ever

suffered unfairly under the provision as it stood (J.A. 235a). However, the Company did agree that an employee would not lose holiday pay because of absence due to the death of his father-in-law or mother-in-law (J.A. 91a, 238a).

At first, the Union rejected all of the Company's proposals (J.A. 238a). However, the Union eventually agreed to one of the Company's proposals: according to union witnesses, this was the provision requiring an employee to notify the Company, if possible, that he was not going to be able to report for work; but according to company witnesses, this was a change in the method of presenting a new work standard to an employee (J.A. 45a; 91a, 122a-125a, 245a-247a, 273a, 337a-338a).⁸

3. *Negotiations just before the strike*

On the afternoon of May 31, following a brief recess in negotiations, the Union asked whether the Company wanted a contract or a strike (J.A. 256a). The Company replied "that a strike was the last thing we wanted, that we were most anxious to get a contract, that we were losing money and we sure didn't need a strike to help us" (J.A. 256a, 340a). The Union then stated that it would extend the contract for one year with the changes the parties had already agreed upon (J.A. 22a, 45a-46a; 256a, 271a, 353a, 358a, 398a, see p. 8, *supra*, and pp. 27-28, *infra*). Following another recess, the Company advised the Union that it still wanted to include in the new contract its

⁸ The Trial Examiner and the Board found it unnecessary to resolve this conflict in the testimony (J.A. 45a, n. 6).

proposals regarding grievance meetings outside working hours (p. 6, *supra*), and the "no vested rights" clause (pp. 22-26, *infra*)—adding, however, "that we were not sold on this language, * * * and * * * would be happy to consider any revision that they wanted to suggest, and all we wanted was a recognition of the principle" (J.A. 46a; 258a). The Company dropped the rest of its proposed contract changes (J.A. 258a).

When this proposal failed to satisfy the Union, the Company again retreated. The Company withdrew its proposal for grievance meetings outside working hours, and substituted a provision that employees would be paid for not more than one hour a week at their base rate for time spent during working hours in discussing grievances (J.A. 80a, 100a-101a, 262a-263a, 297a, 398a-400a, 479a, 503a).⁹ The Company assured the Union that it would be willing to talk about grievances, outside working hours, as long as the Union wished (J.A. 262a-263a). The Union continued to oppose the Company's contract proposals, even with these modifications (J.A. 46a; 99a-100a, 264a-266a). Company Secretary-Treasurer Ayers observed that the Company's perilous financial position meant that it "had to have some help before [it]

⁹ The expiring contract, as interpreted by the arbitrator, required payment at the employee's incentive rate for not more than one hour per grievance (J.A. 479a, 80a, 185a-186a, 399a-400a). While the Company's proposal (unlike the expiring agreement) limited the number to be paid to three, no more than three employees had ever attended grievance meetings (J.A. 186a, 400a).

could enter into a contract" (J.A. 46a; 342a). Ayers commented that the Company's proposed changes in the grievance procedure "would help the Company to save money at no cost to [the Union] in terms of either money or principle or anything else" (J.A. 265a). After some discussion, Ayers told the union representatives that "that's all [he] could do, that this was it, that's all there was, and to take it to the people and let them vote on it" (J.A. 46a; 345a). The union representatives replied that they could not recommend the Company's proposal to the membership and did not think the membership would accept it (J.A. 46a; 131a, 206a-207a, 266a-267a). The meeting then ended (J.A. 46a; 267a).

C. The strike; the negotiations after the strike began; the discharge of the strikers after the Company learned that the strike constituted an unfair labor practice by the Union

That evening, the union representatives submitted the Company's last contract proposal to the membership, with a recommendation that it be rejected (J.A. 47a; 101a-103a, 501a). By an overwhelming margin, the membership turned down this proposal and voted to strike (J.A. 47a; 110a, 123a, 180a-181a, 207a-208a). The strike began the following day, on June 1, 1961 (J.A. 47a; 76a, 123a, 8a, 15a).

On June 6, Federal Mediator Wheeler, in a conversation with Company Attorney Bethell which arose in connection with the affairs of another client, advised Bethell that he had not received the notice of dispute which Section 8(d)(3) and (4) of the Act

required the Union to send at least 30 days before striking (pp. 19-33, *infra*); in fact, Wheeler stated, prior to this conversation he had been unaware that a contract was even being discussed (J.A. 273a-274a, 300a). On the following day, the Company and the Union met in another negotiating session suggested and attended by Wheeler; this was the first session in which any Government mediator participated (J.A. 47a; 110a-111a, 172a, 184a, 300a). The Company stated that it would proceed with the meeting only with an express understanding that it was reserving any right it might have if these notices were not sent or received (J.A. 268a, 352a). The Union replied that it understood this (J.A. 268a).

Mediator Wheeler then met with each party separately (J.A. 111a, 269a). After these discussions with the mediator, the Union observed to the Company that "we ought to be able to work out something on this grievance procedure" (J.A. 269a). The Union stated that it still objected to the Company's proposed "no vested rights" clause, but requested the Company to "write something else up and let us look at it and maybe water it down and we might be able to go along with something along that line" (J.A. 269a-270a, 112a). The Company replied, "We will see what we [can] do" (J.A. 270a, 112a). When the Union asked about the strikers' vacation credit, the Company assured the Union that it would honor an agreement, reached in February 1961, that the strike time would be considered as time worked in determining whether the strikers would receive paid vaca-

tions (J.A. 84a, 270a, 491a).¹⁰ The meeting then adjourned (J.A. 270a).

As of June 1, 1961, the first day of the strike, neither the Federal Mediation and Conciliation Service nor the State Department of Labor had received the notice of dispute called for by Section 8(d)(3) (J.A. 20a, 45a; 80a, 452a). By telegram dated June 8, 1961, Company Secretary-Treasurer Ayers advised the Union (J.A. 20a, 47a; 115a, 499a):

Because of the unlawful character of the present work stoppage at Fort Smith Chair Company you are advised that the Company declines to continue negotiations with [the Union] and that the employment of all people who have participated in the unlawful strike is terminated.

On the same day, Secretary-Treasurer Ayers wrote a letter to each of the employees who had been scheduled to report to work during the strike but had failed to do so, stating, in part (J.A. 20a, 47a-48a; 8a-11a, 15a-16a, 76a-82a, 116a-118a, 452a, 500a):

As a result of your participation in the illegal work stoppage at Fort Smith Chair Company, your services with this Company are terminated. A check for any money due you, including your vacation pay [see pp. 11-12, *supra*] and Memorial Day holiday, if earned, will be forwarded to you in the near future.

¹⁰ To the Company's letter of understanding to the Union with respect to this agreement, Secretary-Treasurer Ayers had added, in his own handwriting, and over his own signature, "This vacation pay will be paid by August 1st in case employees are on strike" (J.A. 491a, 84a).

Also, on the same day, Ayers sent to all employees who were not scheduled to work on June 1, 1961 (the first day of the strike), a letter stating, "If you have not reported for work, or have not made arrangements for a leave of absence on or before Tuesday, June 13, we will assume that you are taking part in the strike, and your employment with the Company will be terminated" (J.A. 20a, 48a; 8a-11a, 15a-16a, 76a-82a, 118a, 452a, 501a). About 10 employees who received this letter, all of whom were union members and were on the Company's checkoff list, were never terminated (J.A. 8a-11a, 15a-16a, 76a-82a, 118a-119a). It was stipulated by all parties, including union counsel, that the persons discharged pursuant to these letters were discharged by the Company "by reason of their participation" in the strike which began on June 1, 1961.¹¹

On June 12, 1961, the plant resumed production with new employees (J.A. 48a; 355a). These employees were hired at wage rates somewhat different from those being paid before the strike, but these

¹¹ The stipulation (G.C.Ex. 2, J.A. 430a-488a) was executed prior to the hearing by the General Counsel, the Company, and the Local, which at that time were the only parties to this proceeding (J.A. 80a, 452a-453a). At the hearing, the International moved to intervene in the proceeding (J.A. 72a). After this motion had been granted, the General Counsel offered the stipulation into evidence, stating on the record that counsel for the International had inspected it (J.A. 72a-73a, 80a). Counsel for the International stated on the record that he had no objection to the receipt of the stipulation (J.A. 80a). The International and the Local have filed with this Court a single opening brief which relies on the stipulation; see, e.g., p. 3.

changes do not appear to have effected any substantial difference in the Company's labor costs (J.A. 48a; 374a-375a).¹² On December 15, 1961, the Union notified the Company that the strike had been terminated, and applied unconditionally for reinstatement (J.A. 48a; 502a, 224a). None of the strikers was reinstated, but some were rehired as new employees (J.A. 48a, 61a-64a; 16a-17a, 76a, 214a-215a, 278a-279a).

II. The Board's conclusions of law and its order

A majority of the Board found that the strike herein constituted a violation of Section 8(d)(4) of the Act on the part of the Union, because it was called without the service of any notice of dispute on the Federal Mediation and Conciliation Service or on the Arkansas Department of Labor, as required by Section 8(d)(3); and that the Company discharged the employees because they were engaging in this strike (J.A. 21a-23a).¹³ A majority of the Board found that because the strike constituted a union unfair labor practice, the employees' participation therein was not activity protected by Section 7 of the Act; and that, therefore, the Company did not violate the Act by discharging them therefor (J.A. 22a, 23a,

¹² The principal adjustment made was the elimination of an "adder," primarily because the Company had to train an entire new work force (J.A. 375a).

¹³ For the reasons summarized in n. 14, p. 15, *infra*, Board Member Fanning found it unnecessary to pass on these questions (J.A. 38a, n. 29).

n. 10, 27a, 28a-29a).¹⁴ Because of this finding by the majority that most of the Union's members had been lawfully discharged, the same majority held that the Company did not violate Section 8(a)(5) by thereafter breaking off negotiations with the Union and unilaterally changing working conditions (J.A. 27a-28a).¹⁵

¹⁴ Board Chairman McCulloch and Board Members Rodgers, Leedom, and Brown all concurred in this conclusion.

Board Members Rodgers, Leedom, and Brown found the strike to be unprotected on the additional ground that by virtue of Section 8(d) of the Act, the strikers' participation therein had deprived them of employee status (J.A. 23a-26a). Chairman McCulloch found it unnecessary to reach this issue (J.A. 29a). Board Members Rodgers and Leedom found that assuming (contrary to the finding of the Trial Examiner and of all four members who reached this issue) that the strikers were not discharged because of their participation in the strike, their discharge was not an unfair labor practice because they had lost their employee status and were participating in an unlawful strike (J.A. 26a-27a). Chairman McCulloch and Member Brown found it unnecessary to determine whether the strike was unlawful, and whether the discharge of the strikers would have violated the Act if it had not been motivated by their strike activity (J.A. 23a, n. 10, 27a, n. 15, 28a-29a).

Board Member Fanning dissented on the ground that (assuming without deciding that the Union violated Section 8(d)(4) by calling the strike and that the employees were discharged for participating therein) their participation therein did not deprive them of employee status and constituted protected concerted activity (J.A. 29a-39a).

¹⁵ Board Member Fanning dissented from this conclusion because of his view (n. 14, p. 15, *supra*) that the discharges were unlawful (J.A. 39a).

SUMMARY OF ARGUMENT

1. The underlying issue in this case is the propriety of the Board's finding that the discharge of the strikers was lawful inasmuch as their bargaining strike—because it constituted a violation by the Union of Section 8(d)(4)—deprived them of employee status and was, in any event, an activity not protected by the Act. This Court's opinion in *Local Union 219, Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 105 App. D.C. 232, 265 F. 2d 814, establishes that the Union's action in calling the strike without serving notices of the dispute upon Government mediators constituted, at least *prima facie*, a violation of Section 8(d)(4). Moreover, the facts in this case indicate that service of such notices might well have accomplished the very purpose which led Congress to require them—i.e., the prevention of the strike because of the intervention of Government mediators who can assist the parties in reaching an agreement.

The testimony credited by the Trial Examiner and by the Board eliminates any factual basis for the Union's contention that its strike did not violate Section 8(d)(4) because, just before the strike, the Union had allegedly abandoned its desire for contract modifications and was seeking only a renewal of the old agreement. Furthermore, even if the Union had in fact so modified its bargaining position (long after the date on which the statute required the Union to serve notices on Government mediators), a strike in support of that position would violate Sec-

tion 8(d)(4). At the time that the notices to Government mediators were due, their service was a statutory duty resting on the Union, which never discharged it. Because the strike might never have occurred had the Union complied with its obligation to serve these notices, the statutory purpose of furthering industrial peace militates against the Union's contention that this strike was legalized by its alleged last-minute change of bargaining position. This proposed interpretation of the statute would, moreover, bring the disquiet of a potential lockout or strike into what Congress intended as a "cooling-off" period; for a party which Section 8(d) had previously disabled from engaging in such industrial warfare could always evade these obligations by suddenly expressing a willingness to agree to extending the old contract. In addition, the Union's reading of the statute would interfere with the parties' ability to reach an agreement, because they would have to evaluate all bargaining proposals in terms of their effect upon the applicability of Section 8(d)(3) as well as on their substantive merits.

2. The Board properly found that the discharge of the strikers was lawful because the strike, being a union unfair practice, was not protected concerted activity. The strikers were subject to the statutory provision which withdraws employee status from the participants in strikes violative of Section 8(d)(4); for the incentives which Congress gave employers, unions, and employees to respect the mediation period were designed to dovetail with each other. In any event, participation in a union unfair labor practice

is not a protected activity even though it may not entail loss of employee status.

ARGUMENT

The Board Properly Found That the Company Did Not Violate the Act By Discharging the Strikers and Thereafter Withdrawing Recognition From the Union

A. Introduction: the issue defined

While the complaint in this case alleged that the Company violated the Act by discharging the strikers and thereafter refusing to bargain with the Union, the underlying issue herein is the propriety of the Board's finding that the strikers were lawfully discharged. If the Board was correct in so finding, these discharges validly destroyed the Union's representative status, and, therefore, the Company was under no subsequent duty to bargain with it. See, e.g., *United Electrical, Radio and Machine Workers of America, Local 1113 v. N.L.R.B.*, 96 App. D.C. 46, 52, 223 F. 2d 338, 344, cert. denied, 350 U.S. 981; *Boeing Airplane Co. v. N.L.R.B.*, 85 App. D.C. 116, 174 F. 2d 988.

As previously noted, a majority of the Board found that the discharge of the strikers was not unlawful, on the ground that it was motivated by their participation in a strike which was not protected concerted activity because it constituted a violation by the Union of Section 8(d)(4). In its brief, the Union contends that the strike did not constitute an unfair labor practice on its part; and that if it did, the discharge of the strikers was nonetheless unlawful because the

strike was protected concerted activity so far as the strikers themselves were concerned. We shall show that the record evidence in this case and the statutory language and spirit establish the propriety of the Board's action in dismissing the complaint herein.

B. The Board properly found that the strike herein constituted a violation of Section 8(d)(4) on the part of the Union

Section 8(b)(3) of the Act renders it an unfair labor practice for a union which is the statutory representative of an employer's employees "to refuse to bargain collectively" with that employer. Section 8(d) of the Act defines this duty, in relevant part, as follows:

... where there is in effect a collective-bargaining contract . . . , the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such

notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The undisputed evidence in the instant case establishes that the Company and the Union were parties to a collective bargaining agreement; that the Union sought to incorporate a number of substantial changes into a succeeding agreement; and that in accordance with this purpose and pursuant to Section 8(d)(1), the Union served on the Company, 60 days before the date on which the old contract was due to expire by its terms, a notice of a desire to terminate it. The evidence further shows, however, that although no new agreement was ever reached, neither the Federal Mediation and Conciliation Service nor the Arkansas Department of Labor ever received the 30-day notices called for by Section 8(d)(3); nor, so far as this record shows, were they ever sent.¹⁶

¹⁶ There is no record evidence that adequate notices were even mailed. Moreover, the Union in effect concedes (Br. p. 2) that if they had been, they would be ineffective in view of the stipulation that neither the Federal Conciliation Service nor the State Department of Labor received a copy (J.A. 45a; 452a, 80a). *In re Leterman, Becher & Co., Inc.*, 260

These undisputed facts establish, at least *prima facie*, that the Union called a strike without serving the notices required by Section 8(d)(3), thereby violating Section 8(d)(4). *Local Union 219, Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 105 App. D.C. 232, 265 F. 2d 814;¹⁷ *International Union of Operating Engineers, Local No. 181 v. Dahlem Construction Co.*, 193 F. 2d 470 (C.A. 6); *Schneid v. District 50, United Mine Workers*, 40 LRRM 2529, 33 L.C. para 70,885 (D.C.N.D. Ill., July 26, 1957).¹⁸

Moreover, it is distinctly possible, if not probable, that the Union's compliance with its statutory duty to serve notices on Government mediators before strik-

F. 543, 547-549 (C.A. 2), cert. denied, 250 U.S. 688; *Conway v. First National Bank*, 256 F. 277, 281-282 (C.A. 5); *Baldwin v. Fidelity Phenix Life Insurance Company of New York*, 260 F. 2d 951, 953-954 (C.A. 6); *Haldane v. United States*, 69 F. 819, 821-823 (C.A. 8).

¹⁷ Contrary to the Union's contention (Br. p. 14), this Court specifically held in *Local 219* that a strike more than 60 days after service of the Section 8(d)(1) notices, but less than 30 days after service of the Section 8(d)(3) notices, violates Section 8(d)(4). 105 App. D.C. at 233-235, 237-238, 265 F. 2d at 815-817, 819-820.

¹⁸ But see, *Procter & Gamble Independent Union of Port Ivory, N. Y. v. Procter & Gamble Manufacturing Co.*, 312 F. 2d 181, 188-189 (C.A. 2), cert. denied, 374 U.S. 830. The Second Circuit's interpretation of Section 8(d)(4) in this case was one of several bases for its ultimate conclusion that failure to give the 30-day notices did not have the effect of extending the old contract as a basis for a civil breach-of-contract action, and was admittedly based upon the "text" of Section 8(d), which (as the Supreme Court and this Court have held, pp. 33, 49 *infra*) cannot be interpreted literally.

ing would have achieved precisely the result which Congress intended to foster in requiring these notices—namely, the consummation of an agreement without a strike (see pp. 35-36, 38, *infra*). As shown on pp. 8-12, *supra*, when the strike began, a major issue dividing the parties was the Company's "no vested rights proposal" regarding the determination of production standards for new incentive jobs. The expiring agreement contained production standards provisions which the Company had reason to anticipate would be interpreted in arbitration proceedings (although wrongly interpreted, in the Company's opinion) as requiring that any standard set for a new job would have to permit every employee on that job to earn the same average incentive pay he had earned in performing any job to which he had previously been assigned (J.A. 453a-463a, 497a-498a, 504a-521a, 80a, 90a, 275a-276a, 283a-284a, 291a-292a, 303a-308a, 319a-320a, 323a).¹⁹ The Company feared that this principle, if applied in future grievance proceedings involving job standards, would result in unduly high hourly rates (in some instances, double the base rate) if any employee involved had previously been assigned to any job with too low a standard which the Company had not attempted to modify be-

¹⁹ The Company anticipated this interpretation because of an award which had been issued by the arbitrator named in its contract with the Union and which involved a contract, between the Union and another furniture company in which Company Secretary Treasurer Ayers held an interest, containing precisely the same language as the Company's own contract with the Union (J.A. 297a-298a, 453a-463a, 504a-521a, 80a, 319a-320a, 323a, 295a-296a).

cause, for example, the job was very seldom performed (J.A. 305a, 307a, 308a, 319a-320a, 323a, 334a-335a, 342a-343a, 504a-521a).

So far as the record shows, the meaning of the foregoing provisions had not yet been the subject of any dispute regarding the wages of any individual Company employee (see J.A. 297a).²⁰ However, in order to forestall the possibility of substantial increases in wage costs during the term of the new contract as a result of such an arbitrator's award, the Company sought to add to the agreement its so-called "no vested rights" clause—i.e., "No employee has a vested right in any level of incentive earnings"—together with a provision that an independent review (through the contractual grievance and compulsory arbitration procedure) of a newly studied standard would be justified only after a "*prima facie* showing that the standard denies a normal employee a reasonable opportunity to make" 20 to 25 percent above the base rate (the rate set out in the contract as the "average" incentive pay which job standards were to permit the employees to earn) (J.A. 456a-458a, 497a, 80a, 90a, 239a-240a, 242a-244a, 284a-285a).

The record indicates that both the Company and the Union were willing to accept a pay schedule which would leave the employees' pay check about the same size as they had been under the expiring agreement (J.A. 128a, 211a, 243a-244a, 275a, 283a, 284a). However, the Union stubbornly resisted the Company's "no vested rights" proposal because it feared

²⁰ See p. 22, n. 19, *supra*.

that this proposal was intended to, and would, effect a general pay cut (J.A. 102a-103a, 128a, 181a, 265a-266a, 522a, 394a). The Company's attorney found it impossible to make it clear to union representative Campbell that the purpose of the Company's proposal was not to cut wages, but to forestall possible substantial increases in wages which the Union found acceptable at the existing level (see, J.A. 265a-266a, 102a-103a, 131a-132a, 242a-244a, 258a, 264a-265a, 342a-344a).²¹ As the Company's attorney described the status of the negotiations just prior to the strike (J.A. 265a-266a):

* * * there just never was a meeting of the minds as to what the Company [wanted]. * * * we were saying that we weren't changing the contract in substance, and they were arguing that we were wanting to cut rates, and that is why I say that we really were talking about different things. We were talking about the same subject, but we were far apart in our understanding of the purpose. * * * We felt * * * that the Union wasn't trying, or didn't understand our proposal, and they apparently felt like we were trying to put something over on them.

²¹ The Company's sincerity in making these assurances is borne out by the fact that after it discharged the strikers and withdrew recognition from the Union, the Company hired new employees at substantially the same base rates as it had previously paid and left more than 90 percent of the incentives and standards unchanged (J.A. 373a-375a). Moreover, Company Secretary Treasurer Ayers testified that the adjustments which the Company did make were "greatly in excess of any possible adjustment that the Company felt might have been made" under its proposed contract (J.A. 374a, 343a).

This inability of union representative Campbell to understand the explanation of the Company's lawyer as to the purpose of the "no vested rights" clause, and Campbell's consequent conclusion that the Company was trying to "put something over," may well have been due partly to a layman's natural reluctance to accept assurances from an adversary's lawyer, and partly to a lawyer's difficulty in explaining relatively complicated matters in laymen's language. A dispute which arises from such failure of communication between the parties is particularly likely to be resolved after the intervention of a Government mediator whom the parties can accept as impartial and who has experience in assisting the parties to overcome such barriers. As the Federal Mediation and Conciliation Service has put it:

The mediator often finds that a lack of understanding is the basic reason for what superficially appears to be an irreconcilable difference in viewpoints. In such a situation, if the mediator can improve communication between the two, the solution often quickly emerges; with each side saying to the other, "Well, why didn't you say so in the first place?"²²

In fact, the record suggests that Federal Mediator Wheeler had actually begun this process during the final meeting between the parties, which was the only one held after he learned about the dispute (pp. 11-12, *supra*). Had he been advised of the dispute

²² Federal Mediation and Conciliation Service, Tenth Annual Report, Fiscal Year 1957 (Govt. Print. Off.), p. 5.

only a few days earlier, he might (for example) have brought the parties to agree to the Company's proposal with the addition of a proviso that no general wage reduction was to be effected, or to a provision defining or limiting the weight to which previous earnings on other jobs were to be given in determining appropriate standards on new jobs.

In sum, had the Union advised the Government mediators of the dispute between the parties and thereby enlisted their aid, there might have been no strike. This is precisely the purpose which the notice provisions of Section 8(d) were designed to serve. The Union contends, however, that its strike without serving the 30-day notices did not constitute an unfair labor practice because, by the time the strike occurred, the Union was allegedly merely seeking an extension of the expired contract.²³ The Union relies on

²³ The Union does not press before this Court its contention before the Board that its strike did not violate Section 8(d)(4) because it was allegedly caused by the Company's failure to bargain in good faith. See *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 284-289; *Local Union 219, Retail Clerks International Association; AFL-CIO v. N.L.R.B.*, 105 App. D. C. 232, 234, 265 F. 2d 814, 816; *N.L.R.B. v. Wagner Iron Works*, 220 F. 2d 126, 140-142 (C.A. 7), cert. denied, 350 U.S. 981; *Mrs. Fay's Pies, Inc.*, 145 NLRB No. 48; *Local 833, UAW-AFL-CIO v. N.L.R.B.*, 112 App. D. C. 107, 112, n. 19, 300 F. 2d 699, 704, n. 19, cert. denied, 370 U.S. 911; *Biazevich, et al., d/b/a MV Liberator*, 136 NLRB 13, 20-21.

In any event, the evidence summarized on pp. 4-10, *supra*, shows that the Company's bargaining demands were reasonable on their face; that the Company gave the Union wholly reasonable grounds for seeking these proposals and opposing those advanced by the Union; that the Company

the literal language of the statute, which requires "the party desiring such termination or modification" to serve such notices and forbids it to strike or lock out for a specified period after serving them. However, the evidence credited by the Trial Examiner and the Board (pp. 4-5, 8-10, *supra*) fully supports the Board's finding (J.A. 22a) that at all times the Union wanted a new contract some of whose terms differed from those included in the expiring agreement.²⁴ More-

substantially retreated from its initial bargaining position; and that the Company at no time sought any change in the provisions of the expiring contract which tended to enhance the prestige of the Union itself, such as a union shop, checkoff, top seniority for union stewards, leaves of absence for employees on the Union's payroll, and bulletin boards for the Union's use. This evidence fully supports the finding of the Trial Examiner (J.A. 49a) and the Board (J.A. 21a, n. 4) that the Company bargained in good faith. See, *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 401-409; *Division 1142, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO v. N.L.R.B.*, 111 App. D.C. 68, 69-70, 294 F. 2d 264, 265-266; *Warehousemen and Mail Order Employees, Local No. 743 v. N.L.R.B.*, 112 App. D.C. 280, 282-284, 302 F. 2d 865, 867-869; *N.L.R.B. v. Mayer*, 196 F. 2d 286, 290 (C.A. 5); *N.L.R.B. v. Norfolk Shipbuilding and Drydock Corp.*, 195 F. 2d 632, 634 (C.A. 4).

²⁴ The Union's contrary contention (Br., pp. 4, 22, 23) relies on its representatives' testimony that immediately prior to the strike the Union told the Company that it would agree to an extension of the expiring contract without any changes (J.A. 99a-100a, 127a, 163a-164a, 174a, 178a, 206a). However, the Trial Examiner and the Board discredited this testimony, and credited the Company representatives' denials that the Union made this offer (J.A. 22a, 45a-46a; 271a, 341a-342a, 353a, 404a-405a, 407a, 418a). Such

over, because the literal language of Section 8(d) proscribes all strikes (during the period described therein) by a party seeking termination or modification of a pre-existing agreement,²⁵ the Union can hardly use such language as a basis for its argument (Br. pp. 23-24) that Section 8(d) bans strikes to compel the execution of a modified contract only where the parties are in dispute about the modifications, and not where the parties have agreed to the modifications but are in dispute about whether to retain certain provisions in the old contract. Indeed, such a distinction would be quite impracticable to administer; because in many such situations the employer, although seeking further modifications, might well prefer the old contract (without change) to a new contract which contained only the modifications already tentatively agreed to.

Furthermore, as the Board found (J.A. 21a-22a), the strike violated Section 8(d)(4) even assuming (contrary to the credited evidence) that in the course of negotiations the Union had abandoned its initial purpose in serving a contract termination notice on

credibility resolutions are normally for these triers of fact, and not for this Court. *N.L.R.B. v. Walton Manufacturing Co.*, 369 U.S. 404; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496; *Joy Silk Mills, Inc. v. N.L.R.B.*, 87 App. D.C. 360, 369, 185 F. 2d 732, 741, cert. denied, 341 U.S. 914; *International Association of Machinists v. N.L.R.B.*, 71 App. D.C. 175, 188, 110 F. 2d 29, 42, affirmed, 311 U.S. 72; *International Brotherhood of Operative Potters v. N.L.R.B.*, App. D.C. , 320 F. 2d 757, 759-760.

²⁵ We do not, of course, contend that the statute should be construed literally, either in this respect or in the other respects discussed on pp. 33-42, *infra*.

the Company, and all of its demands for contract changes which it was pressing during the three days before the strike. There can be no doubt, and the Union does not appear to dispute, that the Union's desire for a new contract containing certain provisions different from those in the expiring contract imposed on it the duty to serve on the Company the 60-day termination notices which it in fact served (pp. 3-4, *supra*).²⁶ Nor can there be any doubt that, no agreement having been reached within 30 days after such service and the Union's bargaining position remaining unchanged, the Union was under the further obligation to serve 30-day notices on the Federal and State mediation authorities; and that its failure to do so constituted a continuing violation of the statute on and after the date that such notices were due, irrespective of whether such notices were subsequently served (although they were never served in the instant case, so far as the record shows).²⁷ The statute contemplates, and the record herein gives substantial basis for supposing (pp. 21-26, *supra*), that had the Union complied with its statutory duty to serve such notices, Government mediators would have assisted the parties in the consummation of a new agreement before the termination date of the old agreement, and thereby the strike might have been avoided. In view of these circumstances,

²⁶ See, e.g., *Boeing Airplane Company v. N.L.R.B.*, 85 App. D.C. 116, 174 F. 2d 988.

²⁷ *Local Union 219, Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 105 App. D.C. 232, 265 F. 2d 814.

it would be inconsistent with the statutory purpose of furthering industrial peace to hold, as the Union contends, that its alleged abandonment of its previous bargaining demands, on the very day before the old contract expired, legalized a strike which might never have occurred had the Union previously complied with the statute.

The Union's contention that its alleged last-minute decision to seek a renewal of the old contract relieved it of the strike inhibitions resulting from its unlawful failure to serve notice on the mediators conflicts in additional respects with the statutory purpose of encouraging the settlement of industrial disputes during the Section 8(d) "cooling off" period and without a strike or lockout. The Union's position necessarily implies that the barriers imposed by the statute upon strikes or lockouts by a party seeking contract changes are abruptly lifted the moment that party expresses willingness to agree to extending the old contract, even though its previous action in strongly pressing extensive contract changes may have been the initial impetus for the further modifications which the other side is still seeking and which still preclude a strike or lockout on its part until 30 days after it serves the notices whose absence was due to the unfair labor practice of the other party to the negotiations. Accordingly, as the Board pointed out (J.A. 21a), "To make this section's continued applicability to the party initially desiring the change turn on the unpredictable course which the ensuing bargaining may take is to bring the disquiet of a potential lockout or strike into an area where Congress wanted quiet."

Moreover, the Union's proposed interpretation of the statute would materially interfere with the ability of the parties to reach an agreement. For example, a union which had failed to serve the Section 8(d) (3) notices, in reliance on its then current desire to renew the old agreement, would have a strong incentive to cling to that position at all times thereafter. The union might be unwilling to risk exploring a modified agreement which might prove acceptable to both parties, lest it render itself liable to unfair labor practice charges under Section 8(d) (3) and (4) and, in addition, endanger its striking members' jobs and its own majority status. The disruptive effect on negotiations would be, if anything, more serious should this Court adopt the Union's further contention (Br., p. 23), which is virtually essential to the Union's position on the facts of this case (pp. 4-5, 8-10, 27, *supra*), that the onus of noncompliance rests upon the party whose bargaining position, immediately prior to the strike or lockout in issue, was further from the terms of the expiring agreement. Under this view of the law, each party would have to formulate its own proposals, and evaluate those of the other, in terms of their effect (intended or not) upon the applicability of Section 8(d) (3) as well as on their substantive merits; and, even so, neither could predict with any real certainty whose demands a third party (the Board and, perhaps, a reviewing court) would later consider more significant deviations from the expiring contract. Contrary to the Union's suggestion (Br. pp. 20, 24-25), no such disruption could flow from the Board's interpretation of the statute; for under

the Board's view a party's obligation to serve the Section 8(d)(3) notices, and to refrain from strike or lockout for 30 days thereafter, remains unaffected by any alteration in either side's bargaining position following the Section 8(d)(1) termination or modification notices.

The Board's interpretation of the statute is implied, if not compelled, by this Court's opinion in *United Electrical, Radio and Machine Workers of America, Local 1113 v. N.L.R.B.*, 96 App. D.C. 46, 49-50, 223 F. 338, 341-342, cert. denied, 350 U.S. 981, which held that an employer was not required to comply with Section 8(d) before terminating an existing collective agreement after the union's action in calling a strike without itself complying with this section. Similarly, in *Schneid v. District 50, United Mine Workers of America*, 40 LRRM 2529, 2533, 33 L.C. para. 70,885 (D.C.N.D. Ill., July 26, 1957), the court held that where "the economic questions involved in the labor contract were initiated by the Union's notice to terminate the existing contract, * * * the duty of notifying the Federal Mediation and Conciliation Service was on the Union." The Board's conclusion that it is the party serving the 60-day notices which must also serve the 30-day notices also gains support from the Senate Report on the Taft Bill, which in all material respects was identical to the Act as enacted. The Report observed, "should the parties fail to agree on a new contract in the next 30 days [after the service of the 60-day notices], the party taking the lead in refusing the

old contract has the duty to notify the * * * Federal Mediation Service of the impasse."²⁸

Nor is a different result indicated by *Mastro Plastics, Inc. v. N.L.R.B.*, 350 U.S. 270, heavily relied on by the Union. As the majority pointed out (J.A. 22a, 26a, n. 14), the issue in that case was whether Section 8(d) applies to a strike protesting employer unfair labor practices—not whether it applies to a strike by a union which initiated negotiations by requesting contract changes but is presently seeking a renewal of the old contract. It is in the context of the issue actually presented that the language relied on by the Union must be read.²⁹

C. The Board properly found that the Company did not violate the Act by discharging the strikers because of their participation in the strike

1. Participation in the strike deprived the strikers of their employee status

Section 8(d) of the Act provides, in relevant part:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3),

²⁸ S. Rept. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 24, I Legislative History of the Labor Management Relations Act, 1947, p. 430 (Govt. Print. Off. 1948) (herein cited as "Leg. Hist.").

²⁹ Cf. *San Diego Building and Construction Trades Council v. Garmon*, 359 U.S. 236, 241. We note that Section 8(d) does not apply to a strike for contract "modification or termination" where the conduct which triggered the walk-out was the employer's unlawful refusal to bargain about the economic issues in dispute. *Mrs. Fay's Pies, Inc.*, 145 NLRB No. 48.

and (4) [see pp. 19-20, *supra*] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a) * * * Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act * * *, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

There can be no doubt, and the Union does not dispute, that this provision empowers an employer to discharge strikers who strike "within the sixty-day period specified in this subsection" because of their participation in that strike.³⁰ The Union contends, however, that the "loss-of-status" provision is inapplicable to the strikers here, because the strike—although a union unfair labor practice in that it was called without the service of the notice to Government

³⁰ *Mastro Plastics, Inc. v. N.L.R.B.*, 350 U.S. 270, 284-289, affirming 214 F. 2d 462, 465-466 (C.A. 2); *United Electrical, Radio and Machine Workers of America, Local 1113 v. N.L.R.B.*, 96 App. D.C. 46, 50-51, 223 F. 2d 338, 342-343, cert. denied, 350 U.S. 981; *Boeing Airplane Co. v. N.L.R.B.*, 85 App. D.C. 116, 119, 174 F. 2d 988, 991; *Local No. 3, United Packinghouse Workers of America, CIO v. N.L.R.B.*, 210 F. 2d 325, 331-333 (C.A. 8), cert. denied, 348 U.S. 822, overruled in other respects, 352 U.S. 282; *Lion Oil Company v. N.L.R.B.*, 221 F. 2d 231 (C.A. 8), reversed on other grounds, 352 U.S. 282; *N.L.R.B. v. Wagner Iron Works*, 220 F. 2d 126, 140-142 (C.A. 7), cert. denied, 350 U.S. 981.

mediators required by Section 8(d)(3) 30 days before a bargaining strike—occurred more than 60 days after the service of the termination notice required by Section 8(d)(1). More specifically, the Union contends that the 60-day period specified in the “loss-of-status” clause refers solely to the 60-day period specified in Section 8(d)(1); and that, therefore, participants in a strike which violates Section 8(d)(4) lose their employee status only where the Section 8(d)(4) violation stems from failure to wait for 60 days after the service of termination notices, and not when it stems from other breaches of Section 8(d)—more specifically, in the instant case, failure to wait 30 days after service of notice on Government mediators.³¹ The Board properly found that the “loss-of-status” is applicable to the latter situation as well. As the Supreme Court observed in *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 288, the “loss-of-status” clause “makes it clear that if § 8(d) is violated by the employees to whom it applies, then they lose their status as employees for the purposes of § 8, 9 and 10.”

The underlying purpose of Section 8(d) is to provide a “cooling-off” period during which the parties are to attempt resolution of their differences without resort to industrial warfare, and to give Federal and State mediators an opportunity to assist in attaining

³¹ The Court specifically reserved this issue in *Local Union 219, Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 105 App D.C. 232, 237, n. 3, 265 F. 2d 814, 819, n. 3.

a peaceful settlement.³² Accordingly, as the Board pointed out (J.A. 25a), the various parts of Section 8(d) "must be read together in order to create an effective and consistent statutory means for achieving the purpose of the section."³³ In pursuance of this purpose, the statute imposes correlative duties upon the employer, the Union, and the employees, and provides correlative incentives for complying therewith. Thus, the employer is required to maintain the employment conditions of the old contract for the period prescribed by the statute, and risks a court order (under Section 10(e) and, perhaps, Section 10(j)) and financial liability if he fails to comply with this obligation.³⁴ Similarly, the Union is under a duty to accept the employment conditions of the old contract during this limited period, and risks a court order and loss or suspension of representative status if it

³² *Local Union 219, Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 105 App. D.C. 232, 235-236, 265 F. 2d 814, 817-818.

³³ See, *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 288; *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 285-286; *Local Union 219, Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 105 App. D.C. 232, 235, 265 F. 2d 814, 817.

³⁴ See, *East Bay Union of Machinists, Local 1304 v. N.L.R.B.*, App. D.C. , 322 F. 2d 411, 413, 415, cert. granted so far as material here, January 6, 1964; *N.L.R.B. v. Central Illinois Public Service Co.*, 54 LRRM 2586, 2588-2589, 48 L.C. para. 18,592 (C.A. 7, November 20, 1963); *Town & Country Mfg. Co.*, 316 F. 2d 846 (C.A. 5), enforcing 136 NLRB 1022, 1030; *N.L.R.B. v. Marcus Trucking Co.*, 286 F. 2d 583, 587-588, 593-594 (C.A. 2); *Graham v. Boeing Airplane Co.*, 22 LRRM 2343, 15 L.C. para. 64,604 (D.C. Wash., June 19 and 22, 1948).

breaches this obligation.³⁵ The employees are required to refrain from striking during this same period; and, although a breach on their part will not entail a Court order against them personally or any personal financial liability, it will entail their losing their employee status for purposes of Sections 8, 9, and 10. The statutory reference to "the duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4)" of Section 8(d) reflects a Congressional purpose to dovetail such duties with each other.

It follows from this analysis that the instant strike—which, as we have shown, exposed the Union to an unfair labor practice order—imposed on the strikers the correlative liability of loss of employee status because of their own participation in precluding the peaceful settlement of the strike issues through the assistance of Government mediators. To interpret the statute differently would ascribe to Congress the view that the contribution to industrial peace made by the 30-day waiting period after service of notice on Government mediators (although no less important, in determining a union's liabilities for breach of its no-strike obligations, then the contribution of the 60-day waiting period after service of termination notices) becomes entitled to less respect than the 60-day waiting period in determining the liabilities of the persons whose assistance—indeed, in the instant case, whose authorization by secret ballot

³⁵ See the cases cited in n. 33, p. 36, *supra*.

—empowered the Union to violate the Act.³⁶ The contention that Government mediators were expected to fill a purely subordinate role in attaining the purposes of the Act was rejected in *Local Union 219, Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 105 App. D.C. 232, 235-236, 265 F. 2d 814, 817-818, where this Court said:

There can be no doubt that the Mediation Service was considered by Congress as a vital part of the collective-bargaining machinery under Section 8(d) and not merely an ancillary feature * * *. * * * notice under Section 8(d) (3) is mandatory and the whole thrust of the section is to give the Service sufficient time to intervene in an effective manner in advance of a stoppage of work, rather than after it has occurred, should the Service deem intervention necessary or desirable. * * * The state and territorial services were no doubt considered to have a comparable function.

No different result is indicated by the reference, in the "loss-of-status" clause, to a strike "within the sixty-day period specified in this subsection;" or by

³⁶ Cf. *United Electrical, Radio and Machine Workers of America, Local 1113 v. N.L.R.B.*, 96 App. D.C. 46, 51, 223 F. 2d 338, 343, cert. denied, 350 U.S. 981, where this Court upheld an employer's action in discharging, as "participants" in a strike which violated Section 8(d), union members who were not scheduled to work at the time the strike began, on the ground, *inter alia*, that "the strike was called by the Union at a meeting which every member was entitled to attend, and the strike action received the support of every member present. * * * these employees were found by the Board to have acquiesced in, ratified, and become parties to their agent's action."

similar references to the "sixty-day" period in the legislative history of the Act (see J.A. 32a-34a). The draftsmen of the Act might well have regarded the further specification of the 30-day period as superfluous in view of the fact that the statute requires the notice which starts the 30-day waiting period to be given within 30 days of the notice which starts the 60-day waiting period. Of even less significance, we submit, are references to the "60-day" period in the legislative history relating to the "loss-of-status" clause. These references merely telescoped the two periods in order to achieve brevity in discussions where there was no reason to distinguish the two periods. In fact, most of these references to the 60-day period, if they are taken as exempting from the "loss-of-status" provision participants in any strike more than 60 days after the termination notices, must likewise be taken as exempting such strikes from the union unfair practice provisions of Section 8(d)(4). This interpretation of the statute, however, is directly contrary to the conclusions reached by this Court of Appeals, and by other courts, in the cases cited on p. 21, *supra*.

The inferences which the Union would draw from these references to the 60-day period would, moreover, virtually compel the conclusion that where the termination notices are given earlier than the statute commands (e.g., pursuant to a contract which calls for a 90-day or 120-day termination notice), the "loss-of-status" clause would be inapplicable to strikers who struck well before the expiration of the contract, so long as they took care not to strike within

60 days after the termination notice. That Section 8(d) may not be interpreted to reach this result was pointed out by the concurring opinions in *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 302-303.³⁷

The Union can derive no comfort from Section 13 of the Act, which provides, "Nothing in the Act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, *or to affect the limitations or qualifications on that right*" (emphasis supplied). We have previously shown that the strike herein was "specifically" forbidden by Section 8(d) of the Act and, hence, comes within the exception spelled out in the language of Section 13 itself. As the majority noted (J.A. 27a, n. 15), Senator Taft (the chief architect of the Taft-Hartley Act in the Senate), in a statement twice quoted by the Supreme Court as authoritative,³⁸ pointed out that the Act does "nothing to outlaw strikes for basic wages, hours, and working conditions *after proper opportunity for mediation*" (emphasis supplied).³⁹

Likewise without merit is the Union's contention (Br., pp. 18-19) that the order issued in *Retail Clerks International Association, Local No. 1179, AFL (J. C. Penney Co.)*, 109 NLRB 754, constitutes a holding

³⁷ The dissenting portion of these opinions involved issues not relevant here.

³⁸ *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 673, n. 8; *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 235, n. 13.

³⁹ 93 Cong. Rec. 3835, 2 Leg. Hist. 1007.

(contrary to the Board majority herein) that the participants in a strike before adequate notice to Government mediators retained their employee status. All that the Board did in *Penney* was to forbid the specific kind of unfair practice found—i.e., a violation of the statutory bargaining provisions.⁴⁰ The Board did not determine whether the respondent union in *Penney* was the statutory representative on the date of the Board's order; indeed, it could not have done so, for the respondent union's representative status could have been affected by events after the close of the hearing, including the rehiring of the strikers.⁴¹ That the *Penney* order was not based on the assumption that the respondent union retained its representative status is shown both by its ban on similar refusals to bargain with "any other employer" and by the omission of any time limitation (see n. 40, p. 41, *supra*).

Moreover, even if the terms of the Board's order in *Penney* did imply that the strikers retained their employee status, nothing in the Board's decision

⁴⁰ The order required the striking union to cease and desist from "Refusing to bargain collectively with * * * J. C. Penney Company [the charging employer] or any other employer, by failing to notify the Federal Mediation and Conciliation Service and any appropriate State agency of the existence of the dispute * * * within 30 days after service of notice upon * * * J. C. Penney Company, or any other employer, that the Respondent Union seeks or desires modification of a collective-bargaining contract." 109 NLRB at 760.

⁴¹ Section 8(d) provides that the loss of status therein effected "shall terminate if and when [the striker] is reemployed."

suggests that this issue was raised by the parties or consciously considered by the Board. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511. In a later case where the Board did specifically consider this same "loss-of status" issue,⁴² the Board issued an order substantially similar to the *Penney* order, and expressly reserved the question of whether the participants in the respondent union's Section 8 (d) (4) strike had retained their employee status. In the case at bar the Board expressly considered that question, and answered it—correctly, as we have shown—in the negative.

2. *Strike participation was in any event an unprotected activity, for which the strikers could be discharged, because the strike constituted a union unfair labor practice*

We have shown on pp. 20-33, *supra*, that the strike herein constituted an unfair labor practice on the part of the Union. Accordingly, even assuming that the "loss-of-status" clause is inapplicable to the strikers, participation therein was an activity for which the strikers could lawfully be discharged. See, *Local Union No. 1229, International Brotherhood of Electrical Workers, AFL v. N.L.R.B.*, 91 App. D.C. 333,

⁴² *Brotherhood of Locomotive Firemen and Enginemen (Phelps Dodge Corp.)*, 130 NLRB 1147, 1148, n. 1, 1149, 1154, set aside on grounds irrelevant here, 302 F. 2d 198 (C.A. 9).

334-335, 202 F. 2d 186, 187-188;⁴³ *N.L.R.B. v. Puerto Rico Rayon Mills, Inc.*, 293 F. 2d 941, 947 (C.A. 1); *N.L.R.B. v. Thayer Company*, 213 F. 2d 748, 755-756 (C.A. 1), cert. denied, 348 U.S. 883;⁴⁴ *Simmons, Inc. v. N.L.R.B.*, 315 F. 2d 143 (C.A. 1); *N.L.R.B. v. Dallas General Drivers, Warehousemen & Helpers, Local 745, AFL-CIO*, 264 F. 2d 642, 646 (C.A. 5), cert. denied, 361 U.S. 814; Archibald Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319, 325 (1951). The legislative history of the Taft-Hartley Act discloses that a provision in the

⁴³ In that case this Court held that protection under Section 7 of the Act "is withdrawn only from those concerted activities which contravene either (a) specific provisions or basic policies of the Act or of related federal statutes" (giving as examples the unfair labor practice provisions of Section 8(b)(4)(A), (C), and (D) of the 1947 Act—"the Act expressly prohibits jurisdictional strikes, secondary boycotts and strikes for recognition in defiance of a certified union") "or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute."

This Court held that the particular concerted activity there at issue, which the Board had found unprotected because "indefensible," was protected unless "unlawful," and remanded the case to the Board to determine whether it was "unlawful." The Supreme Court reversed this Court's order on the ground that this Court had construed the scope of Section 7 too broadly. 346 U.S. 464. Nothing in the Supreme Court's opinion, however, suggests that it questioned that aspect of this Court's holding material here—i.e., that Section 7 does not protect employee participation in union unfair labor practices.

⁴⁴ Cited with approval by this Court in *Local 833 v. N.L.R.B.*, 112 App. D.C. 107, 109-112, 300 F. 2d 699, 701-704, cert. denied, 370 U.S. 911.

House bill which specifically excepted participation in concerted activities constituting union unfair labor practices from the employee rights guaranteed by Section 7 of the Act was deleted in conference on the ground that this exception was "unnecessary."⁴⁵

Moreover, in our view the Board's conclusion that participation in such a strike is not a protected concerted activity is compelled by the many precedents holding concerted activity to be unprotected where it violates statutes other than the National Labor Relations Act;⁴⁶ or where it does not itself constitute a violation of any law but seeks to compel the employer to violate the National Labor Relations Act⁴⁷ or other statutes,⁴⁸ or interferes with bargaining by the employees' statutory representative.⁴⁹ Strikes to com-

⁴⁵ See, *International Union, U.A.W., A.F.L., Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 260-261; House Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 59, 1 Leg. Hist. 563; Statement by Senator Taft, 93 Cong. Rec. 6442, 2 Leg. Hist. 1538-1539.

⁴⁶ See, e.g., *Southern Steamship Corp. v. N.L.R.B.*, 316 U.S. 31, 40 (mutiny); *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253-258 (sitdown strike).

⁴⁷ See, e.g., *Hoover Co. v. N.L.R.B.*, 191 F. 2d 380, 386 (C.A. 6); *N.L.R.B. v. Electronics Equipment Co.*, 205 F. 2d 295 (C.A. 2); *N.L.R.B. v. Ohio Ferro-Alloys*, 213 F. 2d 646, 650-651 (C.A. 6).

⁴⁸ See, e.g., *N.L.R.B. v. Indiana Desk Co.*, 149 F. 2d 987, 990-993 (C.A. 7) (Wage Stabilization Act); *American Rubber Products Corp. v. N.L.R.B.*, 214 F. 2d 47, 51 (C.A. 7) (same).

⁴⁹ See, e.g., *N.L.R.B. v. Draper Corp.*, 145 F. 2d 199 (C.A. 4); *Harnischfeger Corp. v. N.L.R.B.*, 207 F. 2d 575 (C.A. 7); *N.L.R.B. v. Sunbeam Lighting Co.*, 318 F. 2d 661, 662-665 (C.A. 7); *Plasti-Line, Inc. v. N.L.R.B.*, 278 F. 2d 482 (C.A. 6).

pel the employer to take action with respect to a matter which is not a mandatory subject of collective bargaining have likewise been held unprotected.⁵⁰ It is well settled, moreover, that employees may be lawfully discharged because of participation in a strike which, although not itself an unfair labor practice, is inconsistent with the terms of a collective bargaining agreement and, hence, with the statutory purpose of attaining industrial peace through encouraging such agreements.⁵¹ Such strikes are unprotected notwithstanding the provisions of Section 13 of the Act relating to the right to strike.⁵² See generally, *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 17; *Local 1229, supra*, 91 App. D.C. at 334-335, 202 F. 2d at 187-188. It would be anomalous indeed to hold that employees may be lawfully discharged for engaging in concerted activities which are improper because inconsistent with the scheme of the National Labor Relations Act or with the collective bargaining process contemplated by that Act, or

⁵⁰ See, e.g., *Cleaver-Brooks Mfg. Co. v. N.L.R.B.*, 264 F. 2d 637, 640-641 (C.A. 7), cert. denied, 361 U.S. 817, and cases cited; *N.L.R.B. v. Coal Creek Coal Co.*, 204 F. 2d 579, 581 (C.A. 10).

⁵¹ See, e.g., *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332; see also, *United Electrical, Radio and Machine Workers of America, Local 1113 v. N.L.R.B.*, 96 App. D.C. 46, 50-51, 223 F. 2d 338, 342-343, cert. denied, 350 U.S. 981; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 104-106.

⁵² *International Union, U.A.W.A., AFL, Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 258-260.

because violative of other laws; while at the same time holding, as the Union contends, that the National Labor Relations Act protects employees from discharge for authorizing and participating in the very unfair labor practices forbidden by a subsection of the Act itself which expressly describes the obligations thereunder as "duties imposed upon * * * employees" (see pp. 33-34, *supra*.) It is wholly unreasonable thus to attribute to Congress the intent to return with one hand what it has taken away with the other. All that an employee need do to protect his job is to refrain—as did some company employees who were not discharged—from participating in the union's unfair labor practices. He cannot, of course, be discharged merely because he is a member of a union which is violating the Act.⁵³

The contention that the instant strike was necessarily protected activity if the "loss-of-status" clause was inapplicable thereto was in effect rejected in *Mastro Plastics, supra*, 350 U.S. at 287, where the Supreme Court indicated that the "loss-of-status" clause might constitute only a "clarification" of the law which would be applicable if the clause were omitted. Moreover, it is by no means clear that the statutory protection afforded participants in a strike which is merely unprotected is the same as that afforded "loss-of-status" strikers. Participants in an

⁵³ *International Ladies' Garment Workers' Union v. N.L.R.B.*, 99 App. D.C. 64, 67-71, 237 F. 2d 545, 548-552; *Simmons, Inc. v. N.L.R.B.*, 315 F. 2d 143, 147 (C.A. 1); see also, *N.L.R.B. v. Local 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, 474-475.

unprotected strike which does not constitute an unfair labor practice and is not otherwise unlawful do not automatically lose their employee status. The employer must affirmatively exercise his option to terminate the relationship; and, although he may lawfully discharge them because of their unprotected strike activity, he may not lawfully discharge them because they have engaged in other conduct which is protected by the Act.⁵⁴ As to "loss-of-status" strikers, on the other hand, some authorities suggest that once an employer has advised them that he has elected to regard the employer-employee relationship as severed by virtue of their participation in a strike violative of Section 8(d)(4), they have no claim to reinstatement on the ground that the real motive for the employer's conduct was their union membership or their exercise of other rights protected by Section 7.⁵⁵ Similarly, participants in an unprotected strike may be eligible to vote in a representation election, so long

⁵⁴ *N.L.R.B. v. Wallick*, 198 F. 2d 477, 484 (C.A. 3); *N.L.R.B. v. Coal Creek Coal Co.*, 204 F. 2d 579, 582-583 (C.A. 10); *Metal Blast, Inc. v. N.L.R.B.*, 324 F. 2d 602, 603-604 (C.A. 6); see also, *N.L.R.B. v. Cone Brothers Contracting Co.*, 317 F. 2d 3, 7-8 (C.A. 5), cert. denied, December 9, 1963.

⁵⁵ See, *United Electrical, Radio and Machine Workers v. N.L.R.B.*, 96 App. D.C. 46, 50-51, 223 F. 2d 338, 342-343, cert. denied, 350 U.S. 981; *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 296 (dissenting opinion); *Boeing Airplane Co. v. N.L.R.B.*, 85 App. D.C. 116, 119, 174 F. 2d 988, 991; *Local No. 3, United Packinghouse Workers of America, CIO v. N.L.R.B.*, 210 F. 2d 325, 331-333 (C.A. 8), cert. denied, 348 U.S. 822, overruled in other respects, 352 U.S. 282; *Lion Oil Company v. N.L.R.B.*, 221 F. 2d 231 (C.A. 8), reversed on other grounds, 352 U.S. 282.

as they have not been lawfully discharged;⁵⁶ while a "loss-of-status" strike may, standing alone, deprive its participants of their franchise in a representation election.⁵⁷ Whether such distinctions exist need not be determined in the case at bar; for the Company affirmatively discharged the strikers, and their discharge was motivated by their participation in the strike.⁵⁸ We suggest these considerations only to show

⁵⁶ See, *N.L.R.B. v. Worcester Woolen Mills Corp.*, 170 F. 2d 13, 15-16 (C.A. 1), cert. denied, 336 U.S. 903; *Wallick*, *supra*, 198 F. 2d at 484-485; *Coal Creek Coal*, *supra*, 204 F. 2d at 582-583; *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1677; *National Gypsum Co.*, 133 NLRB 1492, 1493-1494; *Union Manufacturing Co.*, 101 NLRB 1028, 107 NLRB 184, enforced, 95 App. D.C. 252, 221 F. 2d 532, cert. denied, 349 U.S. 921; *Old King Cole, Inc. v. N.L.R.B.*, 260 F. 2d 530 (C.A. 6).

⁵⁷ See, *Boeing Airplane Co. v. N.L.R.B.*, 85 App. D.C. 116, 174 F. 2d 988.

⁵⁸ Having stipulated that this was the motive for their discharge (p. 13, *supra*), the Union is in a poor position now to protest the Board's finding in conformity with the stipulation. See, *Cupples Co. Manufacturers v. N.L.R.B.*, 106 F. 2d 100, 118 (C.A. 8); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F. 2d 584, 586 (C.A. 9); *O'Malley v. Yost*, 189 F. 2d 331, 332 (C.A. 8); *United States v. 12,800 Acres of Land*, 69 F. Supp. 767, 775 (D.C. Neb.); *Burstein v. United States*, 232 F. 2d 19, 24 (C.A. 8). In any event, the Company's letters to the Union and to the individual strikers gave the strike as the sole reason for their discharges, and the Company did not discharge 10 employees whom it knew to be union members but whose absence during the strike was not due to participation therein (p. 13, *supra*). So far as this record shows, the Company's previous relationship with the Union had always been good, and the Company evinced not the slightest intention of discharging the strikers until after the

that rejection of the Board majority's determination that the "loss-of-status" clause was applicable to the strike herein would not call for rejection of the Board's finding that the discharges were lawful. See the concurring opinion of Board Chairman McCulloch at J.A. 28a-29a.

* * * *

In sum, the most that the Union can claim is that the Board could perhaps have read another way provisions, with respect to the obligation to serve notices on Government mediators and the legal status of participants in a strike not preceded by such notices, in which "there are no 'plain words'" (*Local 219, Retail Clerks, supra*, 105 App. D.C. at 235, 265 F. 2d at 817). Congress has committed to the Board in the first instance the interpretation of these provisions; and where, as here, its interpretation is a reasonable one which effectuates the statutory policy, it should be accepted by this Court. *Los Angeles Mailers' Union No. 9 v. N.L.R.B.*, 114 App. D.C. 72, 75, 311 F. 2d 121, 124.

Company's attorney accidentally discovered that the strike violated Section 8(d)(4) (pp. 10-11, *supra*). In fact, on the day prior to the discharges, the Company assured the Union that it would abide by its earlier commitment to consider the strike time as hours worked in determining whether the strikers would receive paid vacations (J.A. 84a, 270a, 491a). The Company did not forfeit its right to discharge the strikers for their unlawful strike merely by being in financial difficulties to which their representative's bargaining policy may have contributed (see pp. 2-3, 7-8, *supra*).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review and modify the Board's order should be denied.

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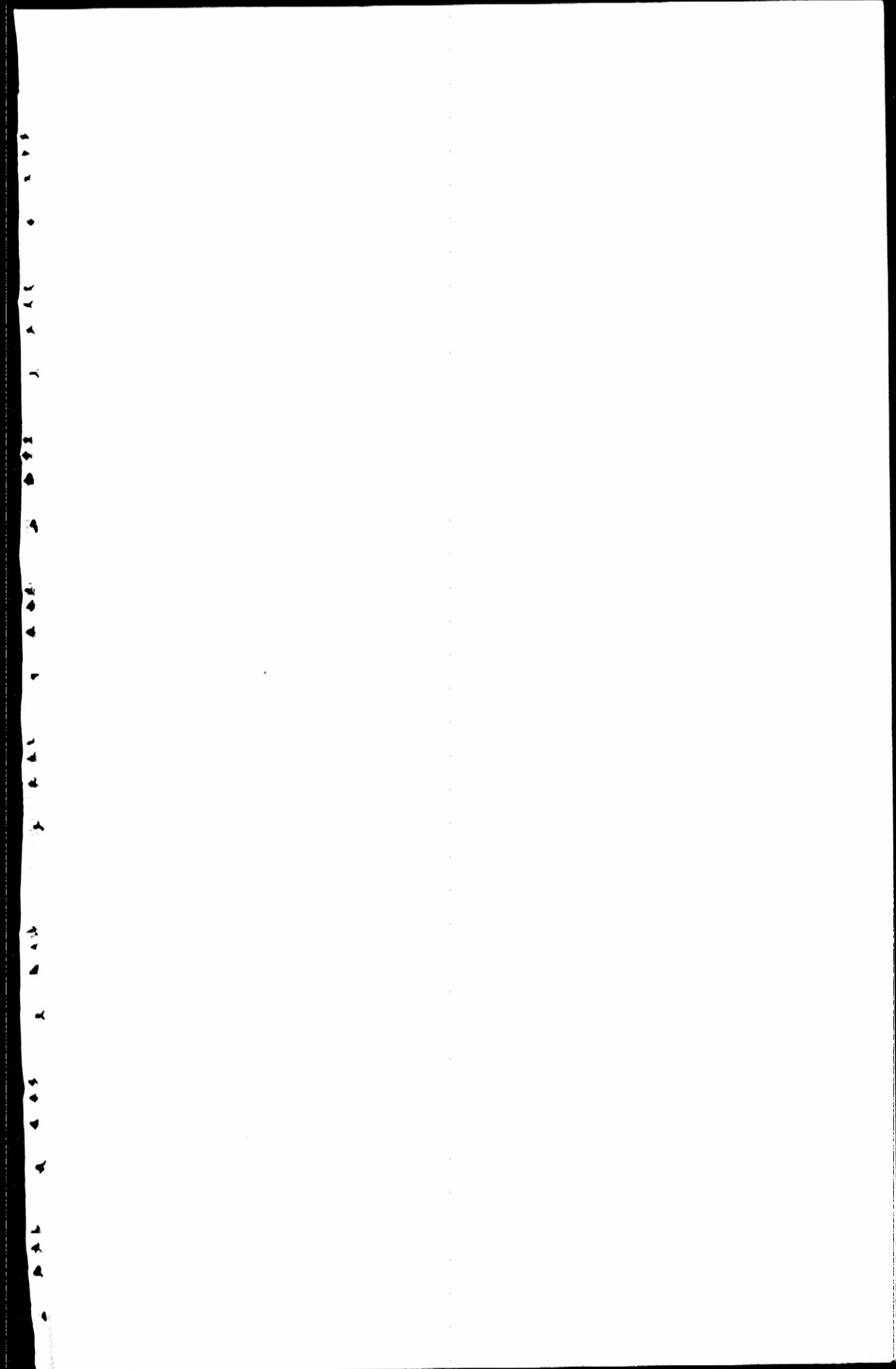
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January 1964



BRIEF FOR PETITIONERS

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 17961

UNITED FURNITURE WORKERS OF AMERICA,
AFL-CIO and LOCAL 270, UNITED FURNITURE
WORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**ON PETITION TO REVIEW DECISION AND ORDER OF
NATIONAL LABOR RELATIONS BOARD**

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United States Court of Appeals

for the District of Columbia Circuit

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Statement of Questions Presented

1) Whether the Board erred in finding that the union violated Section 8(d) of the Act?

2) Whether the Board erred in finding that the individual strikers lost their status as employees pursuant to Section 8(d) of the Act?

3) Whether the Board erred in finding that the conduct of the strikers was not protected activity under Sections 7 and 13 of the Act?

4) Whether the Board erred in finding that the company's discharge of the strikers did not violate Section 8(a)(1) and (3) of the Act?

5) Whether the Board erred in finding that the company's conduct did not constitute a refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act?

INDEX

	PAGE
Statement of Questions Presented	i
Jurisdictional Statement	1
STATEMENT OF THE CASE:	
Parties	2
THE FACTS:	
A. The Contract	2
B. The Negotiations	2
C. The Company's "No Vested Rights'" Proposal	4
D. The Strike Meeting of June 1	5
E. The Negotiating Meeting of June 7	6
F. The Discharges	6
G. The Unconditional Offer to Return to Work	7
The Complaint	7
The Answer	8
The Trial Examiner's Intermediate Report	9
The Board's Decision and Order	10
The Dissenting Opinion of Member Fanning	11
Statutes Involved	11
Statement of Points	12
Summary of Argument	12
ARGUMENT:	
POINT ONE—The Board erred in holding that Section 8(d) was applicable	20

POINT Two—Assuming, <i>arguendo</i> , Section 8(d) applies: the Board's interpretation of it is erroneous; Section 8(d)(4)'s loss of status provision was not intended to work an automatic discharge of employees who strike 60 days after their Union's notice to terminate is served because the Union later omits to file the 8(d)(3) notices	26
(1) The Board rejected the plain meaning of the statute	27
(2) The Board erred in concluding that Section 8(d)(4) must be read to deprive the employees of their status because, though they waited 60 days before striking, their Union did not file the 8(d)(3) notices, a fact of which they were entirely ignorant	29
(3) Legislative history does not support the Board's view that Section 8(d)(4)'s loss of status provision was intended to be construed by stretching the time prohibition against striking beyond 60 days, to include the time during which the Union omits to file the 8(d)(3) notices; and to impose the sanction against employees who strike after 60 days ..	31
(4) The Board's interpretation negates and refuses to follow judicial precedent interpreting Section 8(d)(4), loss of status provision	33
(5) The Board's interpretation disregards the plain words of Section 13	33
(6) Chairman McCulloch's opinion, espousing a wholly separate theory, not adopted by the Board, and holding that the strike was not protected by Section 7 because the Union had failed to serve the 8(d)(3) notice, is contrary to law, and finds no support in the Act	36
Conclusion	37
APPENDIX	38

Cases Cited

	PAGE
Collett, Ex parte, 337 U. S. 55, 93 L. ed. 1207	27
Duralite Company, 132 N. L. R. B. No. 48	13
Flora v. United States, 357 U. S. 63, 2 L. ed. 1165 ..	27
Independent Union v. Proctor & Gamble, 612 F. 2d 181	33
Jay v. Boyd, 351 U. S. 345, 100 L. ed. 1242	27
Mastro Plastics, 350 U. S. 270 *	13, 24
N. L. R. B. v. Erie Resistor Corp., — U. S. —, 53 LRRM 2121	34
Ray Brooks v. N. L. R. B., 348 U. S. 96	13
Retail Clerk's International Association v. N. L. R. B., 265 F. 2d 814	14, 25, 26
Retail Clerks International Association, Local 1179 AFL, etc. (J. C. Penney Company, 109 NLRB 754	18, 30
Rosenman v. United States, 323 U. S. 658, 89 L. ed. 535	27
U. S. v. United Mine Workers, 330 U. S. 258, 91 L. ed. 884	27

Statutes Cited

Labor Management Relations Act, 1947, ch. 120, 61 Stat. 147-148, 29 U. S. C. Section 160(f):	
Section 2(6)	8
Section 7	8, 11, 36
Section 8(a)(1)	8, 9, 10, 11, 37
Section 8(a)(3)	8, 9, 11, 37

	PAGE
Section 8(a)(5)	8, 10, 11, 37
Section 8(b)(3)	13, 19, 25, 26
Section 8(b)(4)	15
Section 8(d)	9, 11, 12, 13, 15, 16, 17, 19, 20, 21, 24, 25, 26, 29, 37
Section 8(d)(1) .	2, 9, 10, 17, 20, 21, 22, 24, 25, 26, 28, 29
Section 8(d)(3)	2, 6, 9, 10, 11, 12, 13, 14, 15, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 31, 33, 36
Section 8(d)(4)	9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 21, 22, 25, 26, 27, 28, 29, 31, 33
Section 10(f)	1
Section 10(j)	13
Section 13	13, 14, 16, 20, 24, 33

United States Court of Appeals

For The District of Columbia Circuit

No. 17961

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO and
LOCAL 270, UNITED FURNITURE WORKERS OF AMERICA,
AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition to Review Decision and Order of
National Labor Relations Board**

BRIEF FOR PETITIONERS

Jurisdictional Statement

The decision and order of the National Labor Relations Board, review of which is here sought, was issued on June 28, 1963. The petition for review of the Board's decision and order was filed with this court on July 1, 1963. On July 22, 1963 the Board filed its answer.

The statutory provisions under which jurisdiction of this petition for review is based are Section 10(f) of the Labor Management Relations Act, 1947, ch. 120, 61 Stat. 147-148, 29 U. S. C. Section 160(f).

STATEMENT OF THE CASE

Parties

This case arose as result of charges filed with the National Labor Relations Board by Local 270 affiliated with the United Furniture Workers of America AFL-CIO (herein called the Union). The Fort Smith Chair Company (herein, the Company) is an Arkansas corporation (JA 6a) and is engaged in Fort Smith, Arkansas in manufacturing furniture.

Petitioners are the United Furniture Workers of America, AFL-CIO, the International Union to which Local 270 United Furniture Workers of America, AFL-CIO is affiliated. Both organizations will hereafter be referred to as the Union.

THE FACTS

A. The Contract.

On March 17, 1961 the Union served the Company with a 60 day notice, (JA 44a) under Section 8(d)(1) of the Act of its intention to terminate the subsisting contract, and to negotiate a new agreement to take the place of the current one, expiring June 1, 1961 (GC. exh. 2, par. 4, JA 451a).

The union did not serve the Mediation and Conciliation notices specified in Section 8(d)(3).

B. The Negotiations.

Bargaining sessions were held on May 29, and May 31, 1961.

The Union was represented by Louis Campbell its chief negotiator, and by the Union Committee.

The Company was represented by Edgar Bethell, its attorney, and John Ayers, its secretary treasurer (JA 330a; 225a).

Demands presented by each side were discussed at the sessions on May 29 and on the morning of May 31. By noon, on May 31 the parties had agreed on two matters.

The Company agreed (JA 235a) to the Union's request that the clause in the contract dealing with holiday pay be changed. The clause appears as Section 5 of General Counsel's exh. 2 at JA 471a, 472a. It grants holiday pay for specified holidays, provided employees work "the day before" and "the day after" the holiday (Section 5(b), G.C. Exh. 2, JA 471a).

The clause lists 5 conditions which would excuse an employee's absence on the "day before" or the "day after" the holiday (JA 472a). He would still get the holiday if his absence on either day were caused by any of the listed 5 conditions, as, for example, sickness, jury duty, etc.

The 5th excusatory condition (JA 472a, clause (5)) reads "(5) Death in the employee's immediate family" (father, mother, sister, brother, wife, husband or child).

The Union had requested that there should be added to the valid excuse for not working "the day before" or "the day after" the holidays, as part of subclause (5), death of "father in law," and "mother in law." The Company had acceded to this change by May 31, noon.

The other matter agreed upon was the demand of the Company that employees should notify the Company, where possible, when they were going to be absent (JA 125a) and the Union had agreed to that (JA 125a).

At the time these demands were agreed upon on the morning of May 31, the Union had additionally requested a 2 cent an hour increase and an extra holiday, both of which the Company rejected.

The parties recessed for lunch.

Upon resumption in the afternoon, Campbell for the Union withdrew his money demands, and offered to extend the contract with or without the two changes agreed upon (JA 163a; 174a; 178a; 206a; 164a). The Company rejected Campbell's proposal.

It then presented its proposals, six in number, set out as Int. Exh. 1, at JA 503a. Two of them were those already agreed upon.

The principal proposal is No. 4, of Intervenor's Exhibit 1 (JA 503a). It reads: "4.—Add to stipulation 'No employee has a vested right in any level of incentive earnings'".

The word "stipulation" in this proposal refers to a special addition to the contract between the Union and the Company. The "stipulation" appears at JA 453a, *et seq.* and concerns the operation of the incentive plan, which in turn is related to the Company's proposal No. 4, the "no vested rights" proposal.

C. The Company's "No Vested Rights" Proposal.

The record shows that negotiations broke down during the late afternoon of May 31 over the Company's "no vested rights" proposal.

Its significance derives from the following: In 1960 a grievance was arbitrated before Father Brown, the designated arbitrator under the contract. It related to the question of incentive pay of 2 employees. Father Brown's award (Int. Exh. 2 JA 504a *et seq.*) ruled in that case that under the "stipulation" and the contract, when the Company changes an incentive standard, it must be so changed as to preserve the level of incentive earnings the employee had been making "on that job" (JA 508a, 509a).

The award was rendered on September 30, 1960 (JA 509a).

Thereafter, Company Counsel Bethell tried a number of times to get Father Brown to cancel the award (Int. Exh. 3, JA 509a; Int. Exh. 4, 515) but he confirmed it again on July 15, 1961 (Int. Exh. 5, JA 517a). The Company, however, continued to oppose the principle of the award.

Bethell admitted that the incentive employees would make less money under the Company's approach to the incentive system than they would under the Brown award (JA 305a, bottom), that the Company "couldn't live" with the principle of the award (JA 305a) and that its binding character prompted the presentation of the Company's "no vested rights" proposal (JA 297a; 298a); he conceded that its elimination was of tremendous importance (JA 318a).

It was against that back ground that the Company's "no vested rights" proposal was offered to the union on May 31.

On receiving it, Campbell pleaded with the Company to withdraw it, stating that the people would not accept it (JA 99a). He offered to renew the old contract (JA 163a; 174a; 178a; 206a), but the Company rejected it.

The Company, however, was adamant on the subject. Ayers insisted that the Company had to have some help, because of its poor financial situation. After further discussion of the clause, Ayers told Campbell two or three times (JA 147a, 148a), "that's it, that's the Company's final offer * * * take it or leave it" (JA 148a; 112a; 147a; 148a; 178a; 207a).

Campbell agreed to present it to the employees but without Union recommendation.

D. The Strike Meeting of June 1.

The following morning the Union held a meeting. The Company's "no vested rights" proposal was discussed (JA 101a; 102a; 103a; 128a).

A secret ballot was taken on the question: "Do you wish to accept the Company offer? (JA 110a).

The members were told that a vote on that proposal was a strike vote (JA 127a).

The vote was to strike: 125 to 22 (JA 208a; 203a).

Picket lines were established. Most of the Company's production employees struck the plant that morning.

E. The Negotiating Meeting of June 7.

A representative of the Federal Mediation Service attended this negotiating meeting held during the strike. Campbell renewed the Union's offer to extend the old contract (JA 209a; 211a; 204a; 173a; 184a), and there was some discussion again about the "no vested rights" proposal, but no agreement.

At this meeting, Attorney Bethell learned for the first time that the 8(d)(3) notices had not been sent.

F. The Discharges.

The following day, June 8, Ayers sent Campbell a telegram discharging all the strikers and declining to continue negotiations (JA 47a; JA 499a; G.C. Exh. 7).

Ayers testified in response to the question (JA 355a) "Why did you discharge the employees and employ a new work force? As follows: "That is a difficult question to answer. * * *"

A. I just want to explain myself. That wasn't the end of my answer. The discharging of these employees was done after several sleepless nights and a lot of thinking. The situation that we were in, our loss picture that this Company had experienced over a number of years, and the *harrassment* that we had experienced, especially during the last five or six years, from *the particular Union organization with which we had had a contract, and our difficulties in obtaining changes in working conditions* which were causing the Company financial difficulty, *the uncompromising position of the Company, of the Union in*

many respects, and the negotiations with regard to changes of the contract. All those aspects entered into the [382] situation of our taking the position we did with regard to these employees. And it was only through wiping the slate completely clean and starting over that we felt that we could find the answer to the possible survival of this Company, from an economic standpoint". (Emphasis supplied).

The discharge telegram (JA 47a) was followed by a letter to striking employees stating they were discharged for engaging in an illegal work stoppage.

There were no further negotiations.

G. The Unconditional Offer to Return to Work.

December 14th the strike was terminated; on December 15th, Campbell sent a letter to the Company (G.C. exh. 11, JA 502a) applying on behalf of all the employees for unconditional reinstatement to their old jobs. The Company refused the offer.

Subsequently, the Union filed a charge with the National Labor Relations Board, which scheduled a hearing to be held in Forth Smith, Ark., on the complaint listed below.

The Complaint

The complaint (JA 5a-12a) based on a charge filed by Local 270, United Furniture Workers of America, AFL-CIO [herein called the Union] charged the Fort Smith Chair Company [herein called the company, or sometimes the employer] alleged that the company had engaged in, and is engaging in unfair labor practices set forth in the National Labor Relations Act, as amended 29 U. S. C. Sec. 151 et seq. [herein called the Act]. The allegations of the complaint factually, and by way of conclusion, [JA 6a, Complaint, paragraphs 3 and 4], state that the em-

ployer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act is admitted by the employer's answer [JA 13a, 14, par. 1].

The complaint alleges that the Union was and is at all material times the exclusive bargaining agent of employees in a stated bargaining unit (JA 7a); that on June 9, 1961 and since then the union requested and is requesting the company to bargain (Complaint, paragraphs 7 and 8, JA 7a), that on and since that date the employer refused to recognize and bargain with the Union, in violation of Section 8(a)(5) and Section 2(6) and (7) of the Act (Complaint, par. 16, JA 12a); that on June 1, 1961 (Complaint, par. 10, JA 8a) the employees went on strike; that on or about June 8, 1961, the company discharged the employees listed in paragraph 11 (Complaint, par. 11, JA 82), that since June 8 the company refused, and continues to refuse to reinstate these employees to their jobs (Complaint, par. 12, JA 11a); that the employer discharged the employees and refused to reinstate them because they engaged in concerted activities and thereby engaged in unfair labor practice violative of Section 8(a)(1) and Section 2(6) and (7) of the Act, as well as 8(a)(3) (Complaint, par. 14 and 15, JA 11a).

The Answer

The company's answer admits it is engaged in commerce within the meaning of the Act (Amended answer, par. 1, JA 14a); admits that the union was the bargaining agent before and on May 31, 1961 (Amended answer, p. 2, JA 14a), *admits it has refused to bargain on and since June 9, 1961*, but denies the union on and since then was and is the duly designated bargaining agent (Amended answer, par. 4, JA 14a).

The company alleges (Amended Answer, par. 4, JA 14a, 15a) that it was justified in refusing to bargain because

the union allegedly instigated an illegal work stoppage in violation of Section 8(d)(3) and (4) of the Act as a result of which the employees lost their status as such (Amended Answer, pars. 4 and 5, JA 14a and 15a).

The company admits it discharged most of the employees but alleges that they were engaged in an unlawful work stoppage (Amended Answer, par. 6, JA 15a); others, listed in paragraph 6 of the Amended Answer, it alleges, had quit before the work stoppage (Amended Answer, par. 6, JA 15a); other listed employees were terminated at a later date (Amended Answer, par. 6) and still others, listed in the Complaint were never terminated.

The Trial Examiner's Intermediate Report

The Trial Examiner found that the strike was not called to obtain a modification of the contract. Its purpose was "to force the Respondent" (the company) "*to abandon its insistence upon substantial changes in the contract, particularly the 'no vested rights' clause*" (JA 51a); he concluded that Section 8(d) did not apply (JA 52a): "The notice requirements of Section 8(d)(1) and (3) do not apply to every strike" (JA 52a). Citing *Mastro Plastics* he found that where a strike is *not* called to terminate or modify a contract, Section 8(d) does not apply and the loss of status provision of 8(d)(4) is also necessarily inapplicable (JA 52a).

He concluded (JA 53a): "Here, as in *Mastro*, the object of the strike was not to terminate or modify 'the contract'. It follows that here, as in *Mastro*, the loss-of-status provision of Section 8(d) of the Act does not apply."

He further concluded that (JA 53a) the company violated 8(a)(1) and (3) in discharging the strikers which also unlawfully prolonged the strike, converting it from an economic to an unfair labor practice strike (JA 53a).

With regard to the refusal to bargain, the Trial Examiner found that the discharge telegram of June 8, and the company's unilateral change of working conditions without consulting the union violated 8(a)(1) and 8(a)(5) of the Act (JA 55a).

He recommended reinstatement of the strikers with back pay (JA 59a) and that the company be required to bargain with the union (JA 58a, 59a), and that the usual notices be posted by the company.

The Board's Decision and Order

The Board decision and order (JA 18-28a) reversed the Trial Examiner, and dismissed the complaint (JA 28a).

The Board held as follows: if a union initiates, by notice under 8(d)(1), the bargaining, it must comply with 8(d)(3) [serve the Mediation notice (JA 21a bottom)]. Since it did not do the latter, the strike was unlawful (JA 22a).

This is true, even on the assumption that the union was willing to renew the old contract (JA 22a), says the majority.

But that assumption is false, for the union was seeking a contract with the modifications already agreed upon (JA 22a). *Mastro Plastics* does not apply because it dealt solely with an unfair labor practice strike (JA 22a).

The June 1 strike was therefore unlawful and the company could discharge the strikers for that reason (JA 22a).

The Board concedes that the loss-of-status provision (JA 24a) refers to the 60 day period in 8(d)(1) and that the strike *did not occur until the 60 day period had elapsed*.

It concedes (JA 25a) that "this Board and Courts have recognized that "the 60 day period in the 8(d)(4) loss-of-status provision is *the one* "specified" in 8(d)(1).

But, it goes on to say, that the "waiting period" includes a full 30 day period after filing the 8(d)(3) notices and that a strike within the 30 day period is unlawful and enjoined (JA 25a). By "parity of reasoning" the same interpretation should apply to Section 8(d)(4), says the Board. Therefore strikes within the initial 60 day period are prohibited as well as strikes beginning less than 30 days after the 8(d)(3) notices are served, or where the strike occurs without the service of such a notice (JA 25a, 26a).

In conclusion, the Board held (JA 26a) that the employees lost their status under Section 8(d)(4) as thus interpreted, that the company did *not* violate Section 8(a)(3) and (1) and that the company did not violate 8(a)(5) in breaking off negotiations.

The Dissenting Opinion of Member Fanning

The dissenting opinion of Member Fanning appears at JA 29a-39a. It is a complete, across-the-board disagreement with each and every argument in the majority opinion. Member Fanning reads the loss of status clause of Section 8(d) as having *exclusive* application to strike action taken during the 60 day period specified in Section 8(d)(1) and (4) (JA 38a). He finds the strike, therefore, entirely *lawful* since it started after this waiting period was over. His documentation of his reading of the statute, and his refutation of the Board's interpretation are quoted at length later on in this brief, and will not be repeated here.

Statutes Involved

The statutes involved in this case are: Section 7, 8(a)(1)(3) and (5), and Section 8(d) and 13 of the National Labor Relations Act, as amended, 29 U. S. C., Section 157, 158a(1)(3) and (5), and Section 158(d) and Section 163.

They are printed in the Appendix.

Statement of Points

The petitioners contend that:

(1) Section 8(d) is not applicable to the facts in this case and (2) even if, *arguendo*, it is, the Board erroneously interpreted the loss-of-status provision of subsection (4) of 8(d) in holding that, though the employees waited for 60 days before striking, they lost their jobs in so doing.

Summary of Argument

The bare bones of the case comes to this: Was Section 8(d)(4) passed to provide employers with the opportunity to discharge employees who strike, not to modify or terminate a contract, but in protest against the employer's insistence on getting substantial, indeed, drastic modifications in the contract, favorable to itself, and affecting the critical area of incentive wages?

The employees did not know the union had not filed the 8(d)(3) notices. *They struck in total ignorance of that fact and in total ignorance that any such requirement was in the law.*

All they knew was that they had a vested right to incentive earnings, that arbitrator Brown had so decided; having in mind themselves and their families, they wanted to preserve the security the contract, as it then subsisted, gave them.

When, therefore, they were presented with the employer's ukase: "take-it-or-leave-it," "this-is-it" demand, that, if there was to be a contract at all, it would be on the employer's terms, that vested rights in incentive earnings might disappear, they were responding as working people to a single question: Should we or shouldn't we, as individuals, work under this proposed wage cut or should we strike?

This is what the strike was against. All the employees did was exercise their right not to work for cut wages.

Surely employees are entitled to rely on their right to strike for this purpose under Section 13. If Section 13 does not allow it, then Section 8(d) overmasters Section 13, and the right to strike is not simply lost, but the exercise of it invites the trap; *to wit*, invocation of the loss-of-status provision of Section 8(d)(4)—invocation of loss of status, in a strike against an employer *who himself wants to modify the contract*, but does nothing to comply with the notice requirements of Section 8(d); sits by, waits for 60 days and, upon discovering what it assumes was a technical flaw, brings down the axe of discharge upon employees wholly innocent, and, more, wholly ignorant of their union's failure to send the 8(d)(3) notices.

There are no words in Section 8(d) or in its legislative history which imply such an inequitable consequence, wholly at variance with the Act's objectives, and wholly contradictory to the rule of *Mastro Plastics*, 350 U. S. 270.

Let us turn to the Employer's position to see if it contains anything of justification.

When the Employer discovered on June 7 the fact that 8(d)(3) notices had not been filed, it could have (a) filed a charge with the Board alleging violation of 8(b)(3) (b) filed a charge seeking an injunction against the union's picketing under 10(j). It did none of those things.

The Board (*Duralite Company*, 132 N. L. R. B. No. 48) and the U. S. Supreme Court (*Ray Brooks v. N. L. R. B.*, 348 U. S. 96) have condemned the use of self help, where, as here, Board processes are available to test the existence of, and to correct, any claimed violation law. As the Supreme Court in *Ray Brooks*, *supra*, said: "If an employer had doubts about his duty to continue bargaining it is his responsibility to petition the Board for relief while

continuing to bargain in good faith until the Board has given some indication that the claim has merit." The especially punitive quality of the employer's conduct is manifested by the fact that there was no need to discharge the employees; they were not working; the employer was not paying them any wage; in sending out the discharge notice all the employer did was memorialize in writing its own interpretation of the law that 8(d)(4) loss of status applied.

This Court's decision in *Local 219, Retail Clerk's International Association v. N. L. R. B.*, 265 F. 2d 814, holds that a union, seeking modification of a contract, commits the unfair labor practice of *refusal to bargain* where it omits to serve the 8(d)(3) notices. But that case does not decide the question presented here: what, impact if any, does the omission to file an 8(d)(3) notice have on Section 8(d)(4)? That question was left open by this Court. The only similarity between *Retail Clerk's, supra*, and this case is that, in both, the union omitted to file the 8(d)(3) notice. In all other respects they differ; there, the union sought modification of the contract; here, the union did not seek modification; there the employees struck to get contract modification; here the employees struck to oppose a proposed wage cut; there, the union was charged with a refusal to bargain for failure to file the 8(d)(3) notice; here, there is no such charge.

Thus, we submit, the seed bed of the issues is the right of *employees* to strike. Section 13 not only affirms, but guarantees its exercise in language which marks, with precision, the generality of its scope; both its integrity and its scope are preserved by the absolute prohibition, stated in Section 13, against the use of "construction", or interpretation by the Board or the Courts of *any part* of the Act so as to "interfere with or impede or diminish in any way the right to strike * * *"; limitation is strictly

confined to the situations specifically provided for in the Act: Sections 8(b)(4); 8(d).

Section 8(d)(3) and (4) are limited to strikes over contract termination or modification; absent that precondition, Sections 8(d)(3) and (4) become irrelevant. Any strike, therefore, not called for the purpose of terminating or modifying a contract can not be made unlawful because the union did not comply with Section 8(d)(3).

It is a fact, *which the Record abundantly supports, that the employees did not strike to modify or terminate the contract. It was the company which sought a modification of the contract.* The Trial Examiner who heard the witnesses and adjudged their demeanor on the stand so found, and concluded (JA 50a).

The strike in fact was not *for* anything at all. It was *against* something. It was against the company proposal which vested in the company the power to cut the wages of employees, about 80% of whom were "on incentive" (JA 184a).

If anything was calculated to undermine the union it was the employer's "no vested rights" proposal. For the union could hardly keep its head up as a bargaining agent, if it were to allow an employer to play fast and loose with an incentive system affecting 80% of its workers. Yet, the employer's adamant insistence that the employees must accept this last, "take-it-or-leave-it" offer certainly lets in the inference that it was trying to destroy or, at a minimum, to enfeeble the union.

The specific gravity and thrust of the employer's purpose in this regard is fixed beyond dismissal or diminution by two undisputed facts: first, the company, promptly following Brown's award, and contrary to its contractual obligation to accept it as final and binding and carry it

out (JA 504a), instead repudiated it, refused to obey it, and persisted from September 30, 1960 through the next year in attempting to get Father Brown to rescind it or modify it (JA 509a). That award had not been obeyed all during the period from its rendition, was not obeyed or accepted at the time of the negotiations for another agreement in May 1961, and at the time of the hearing in this case, the company had unilaterally in June 1961 cancelled the "vested rights" clause and instituted its policy of no vested rights.

Secondly, Mr. Ayers conceded (JA 355a), in substance, that the motive for discharging the strikers was to eliminate the union.

That the employees had a right not to work under a proposal which expunged what they had won, and to strike against accepting that proposal seems clear beyond argument or cavil.

Thus in disregarding the fact that the employees did not strike to terminate, or modify the contract, the Board applied Section 8(d) to a case *where the one condition to its relevance had not occurred*. That error appears to be basic, because Section 13 protects impairment of the right to strike by construction; and certainly a finding that Section 8(d) was applicable, when it was not, was a construction of both Section 8(d) and Section 13; because the strike was a protest against working without the "vested rights incentive clause".

Abundantly supported by the Record is the Trial Examiner's finding that the strike was not to obtain a modification or termination of the contract; that it was, instead, *against* the company's proposed excision from the contract of the "vested rights" incentive clause.

The Board having reached Section 8(d), by overruling the Trial Examiner's finding to the above effect (JA 22a)

proceeded to interpret the language of 8(d) and the loss of status part of 8(d)(4).

In doing so, it committed a number of connected errors; before examining them we return to the statutory context: the loss of status provision of 8(d)(4) deprives strikers of their employee status if they engage in a "strike within the sixty-day period specified in this subsection * * *", (that is, Section 8(d)(4)). The 60 day period "specified in this subsection" refers to the words of 8(d)(4) which require that the party seeking contract modifications or termination, "continues in full force and effect without resorting to strike or lock-out all the terms and conditions of the existing contract for a period of sixty days after *such notice is given* * * *". "Such notice" refers back to Section 8(d)(1) which requires that the written notice (of modification or termination) be served "sixty days prior to the expiration". It is the single and only 60 day notice of termination or modification mentioned in the whole of Section 8(d).

The Board concedes that 8(d)(4) "defines the proscribed period as one of 'sixty days after such notice is given', and admits that *"this Board and courts have recognized that the period thus described refers to the 'specified' in 8(d)(1)"* (JA p. 25a). In short, the Board admits that the measure of the sixty day period in the loss of status section of 8(d)(4) is to be found in 8(d)(1); admits that 8(d)(1) provides for *one and only one* 60 day period; and concludes that this strike occurred after that period ended.

We stop here to evaluate what it is the Board rejects. The Board rejected: (1) its own decisions; (2) decisions of the Courts and (3) the admittedly plain and obvious meaning of Section 8(d)(4) that the 60 day period is the *one and only one*, measured by the notice of contract termination or modification, stated in 8(d)(1).

To justify its rejection of this array of opposing argument, it was incumbent on the Board to marshal argument or present legislative history, of such force as logically to coerce to the conclusion that these opposing judgments and considerations had been properly overmastered.

But, we submit, the turn of its reasoning at this juncture succeeds not in reaching that objective, but in exposing additional error.

Its argument is that 8(d)(3) (requiring the 30 day Mediation notices) has, by the Board, been held to require a longer waiting period than 60 days, where the 8(d)(3) notices are filed late, or not at all; and that a strike called after 60 days, but without the service of the Mediation notices is illegal, citing *Retail Clerks International Association, Local 1179 AFL* etc. (J. C. Penney Company, 109 NLRB 754). Thus the Board holds that, although the loss of status provision prohibits strikes *only* during the 60 day waiting period specified in 8(d)(1), and further although the loss of status section refers to one and only one 60 day period, *it also refers to additional periods enduring for periods from 60 days to infinity.*

The Board thus argues that Section 8(d)(4) means these contradictory and opposed things: its referent is confined to only one 60 day period—the one referred to in 8(d)(1): but it also refers to a plurality of periods, certainly to more than *the one* 60 day period, and certainly to periods longer than 60 days. This is so, says the Board, because Section 8(d)(3) must be complied with, and until it is, 8(d)(4)'s time prohibition against striking continues on and on, until the Mediation Services get the 30 day notice. If the Mediation Services never get the 8(d)(3) notice, the right to strike is barred forever.

This result is achieved by this turn of Board reasoning: in *J. C. Penney*, the union seeking contract modification, struck 4 months after it served the 60 day notice of its desire to modify, but it failed to comply with 8(d)(3).

Finding that, by that failure, the union had refused to bargain, and had violated 8(b)(3), it ordered the union to bargain with the company and required the union to serve the 8(d)(3) notice. As member Fanning states: directing the Union to bargain is wholly inconsistent with the idea that by striking in those circumstances, the employees lost their status as such. Manifestly, there could not be a majority of employees to represent, if the loss of status provision [8(d)(4)] severed that status, *eo instante*. Nothing in the *Penney* case, Board, or Court, suggests "that the striking *employees*, who sought to obtain a lawful labor agreement, lost the protection of the Act by striking," Member Fanning concluded.

The Board next resorts to what it calls a "parity of reasoning". The assumed "parity" is between these two situations: in *Penney*, the union seeking contract modification, fails to notify the Mediation services; in the instant case, the union, not seeking modification, seeks to get the employer to withdraw its "no vested rights proposal"; in *Penney*, the union is charged with a refusal to bargain in failing to serve the Mediation notices; in the instant case, the union is not charged with a refusal to bargain for that or any reason; in *Penney*, the employees struck to get a contract modification; in the instant case, the employees struck *against* the company's proposal to have them work under a "no vested rights" incentive clause.

"Parity of reasoning" in the light of these circumstances is a bloodless abstraction; it has no roots in parallels of fact; it is simply a ritualistic concept that obscures dissimilarities.

The legislative history does not support the Board's view that all of the subsections of Section 8(d) hinge together such that non-compliance with 8(d)(3) stretches the strike prohibition of 8(d)(4).

The legislative history of Section 8(d)(4), as Member Fanning demonstrates in his dissent (JA 33a, footnote 21)

clearly shows that its limitation on the right to strike, *was confined strictly to the one 60 day period specified in 8(d)(1)*.

Finally, the argument the Board starts out with (JA 21a) that "by serving notice of its desire to terminate, * * * the union took upon itself the responsibility of complying with the remaining requirements of 8(d)" and that, in short (JA 21), the duty to comply with Section 8(d) never shifts "from the party who initially invokes that section to the other party" is almost incredible. It states what might be called a "frozen intent" theory. It says, in effect that the union cannot change its mind. Once it expresses a desire to modify or terminate, Section 8(d), as the Board sees it, "freezes" that desire beyond abandonment or alteration. To construe a statute dealing specifically with collective bargaining, a process instinct with change, shift, alteration and abandonment of position, is, at best, unrealistic and at worst, the Board's own projection upon Section 8(d) of its legislative conceptions of what ought to be. There is nothing in the language of Section 8(d) or 8(d)(1) which could conceivably sustain the Board's "frozen intent" theory. And we can find nothing in the legislative history to support what can only be described as a bizarre interpretation.

POINT ONE

The Board erred in holding that Section 8(d) was applicable.

Section 13 guarantees the right to strike: Section 8(d) prescribes certain conditions to the exercise of the right to strike. But only if the section is relevant and applicable.

Hence, before Section 8(d) can be considered as a possible limitation on the right to strike, it is necessary

to determine whether the facts of the case make Section 8(d) relevant at all. The bridge to its relevance is the presence of facts that fit the preconditions stated in the proviso of Section (d):

“* * * where there is in effect a collective bargain-in contract * * * the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, *unless the party desiring such termination or modification—*

- (1) serves a written notice upon the other party of the proposed termination or modification sixty days prior to the expiration date thereof. * * *
- (2) * * *.
- (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, * * * and
- (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract, for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

If a party does not desire to modify or terminate the contract, the conditions to the relevance of Section 8(d)'s subsections do not occur. And if those conditions are not present, Sections 8(d)(1)(3) and (4) are wholly irrelevant, and inapplicable. By force of that circumstance, Section 8(d)(1)(3) & (4) remain insulated from the strike situation; those sections do not reach over the preconditions to their applicability and place a hand of restraint or limitation on the strike. Section 8(d) applies if, but only if, a contracting party desires to modify or terminate the contract. Absent that condition, it is unnecessary to determine what the meaning of Section 8(d)(1)(3) and (4) is, or may be. *The act of establishing their irrelevance ends the matter.*

This record abundantly establishes facts which preclude the application of Section 8(d)(1)(3) and (4):

First: The Union had abandoned any desire to modify or terminate the contract (JA 163a; 178a; 174a; 206a).

Second: The purpose of the strike was not to obtain a modification or termination of the contract (JA 101a; 102a; 103a; 123a; 128a; 110a; 127a).

Third: It was the employer who was seeking a modification of the contract—a serious and substantial modification, giving it the power to cut the incentive wages and earnings of 80% of its employees (JA 112a; 147a; 148a; 178a; 207a; Int. Rep. 46a).

Fourth: The strike was caused by the employer's insistence, upon this substantial change in the contract, upon its desire to *modify the contract*.

The record thus makes it clear that the preconditions to the application of subsections 8(d)(1)(3) and (4) were not present, and the Trial Examiner therefore properly found, that 8(d) was not applicable (JA 52a, 53a), in these words:

“The notice requirements of Section 8(d)(1) and (3) do not apply to every strike. It has been held that they are inapplicable to unfair labor practice strikes. Nor do they apply to every economic strike, as the Respondent seems to argue. Of these requirements, the Supreme Court said in the *Mastro Plastics* case:

“The Board reasons that the words which provide the key to a proper interpretation of Section 8(d) with respect to this problem are “termination or modification.” Since the Board expressly found that the instant strike was *not to terminate or modify* the contract * * * the loss of status provision of Section 8(d) is not applicable. We sustain that interpretation.” (Emphasis in original.)

Here, as in *Mastro*, the object of the strike was ‘not to terminate or modify’ the contract. It fol-

lows that here, as in *Mastro*, the loss-of-status provision of Section 8(d) of the Act does not apply. The strikers were therefore engaged in a lawful economic strike protected by Sections 7 and 13 of the Act. It was accordingly a violation of Section 8(a)(1) and (3) of the Act for the Respondent on June 8, 1961, and later, to discharge the employees listed in Appendixes A and B attached hereto because they participated in such concerted activity. Moreover, these discharges (along with the refusal to bargain discussed below) unlawfully prolonged the strike and converted it from an economic into an unfair labor practice strike."

Commenting on these findings of the Trial Examiner the Board (JA 22a) says "while we have assumed heretofore the correctness of the Trial Examiner's finding that, immediately prior to the strike, the union was seeking solely the old contract, the record does not substantiate his finding".

This statement is incorrect. The record substantiates the Trial Examiner's finding (JA 163a; 178a; 174a; 206a).

Then the Board proceeds (JA 22a); "For, it is abundantly clear that the union was seeking *rather a contract with modifications already agreed upon * * **".

The record does not at all show, either abundantly or otherwise, that the union was "seeking" a contract with the modifications already agreed upon (JA 206a; 198a; 174a; 163a; 178a; 206a).

If, by the word "seeking" the Board meant that the employees were striking to obtain what the employer had already agreed upon, the Record will not show that to be the fact. The account of the strike meeting at no point mentions *that* as an object of the strike and indeed, the two provisions agreed upon were *de minimis*: one was the union's agreement to an Employer's request, the other, the Employer's agreement on the inconsequential subject, of excuse for absence before or after holidays.

And as an "inference" from the record, the Board's assumption falls on the point of its own absurdity, as the Trial Examiner noted in footnote 13 of his Report (JA 51a):

"Although the Union's position on May 31 was that it would renew the old contract with the two changes already agreed to, it cannot seriously be contended that it struck to obtain these two minor changes. A union does not strike to obtain terms to which the employer has already agreed."

The Board's final assumption in support of its theory of 8(d)(3)'s relevance is this: if a union notifies the employer of its desire to terminate a contract, and to negotiate a new one, it can not change its mind. Once done, permanently done. The choice once made, becomes rooted, fixed beyond recall, abandonment, or cancellation. Expressing this view (JA 21a), the Board said: "We therefore conclude * * * that by serving notice of its desire to terminate the existing contract and to negotiate a new agreement, the union took upon itself the responsibility for complying with the remaining requirements of Section 8(d) before engaging in a strike and that its failure to file the notices required by Section 8(d)(3) caused the strike to be unlawful from its inception."

The absolute and unqualified character of this statement invites close scrutiny: First, we stress the words: the union must serve the notice "before engaging in a strike." That statement is obviously too broad and contrary to two authoritative rules which conflict with it: Section 13, and *Mastro Plastics*, 350 U.S. 270, where the union, after serving a notice under 8(d)(1) called a strike against the company's unfair labor practice, without serving the 8(d)(3) notice. Secondly, there is nothing in the language of the statute which suggests that an intention to terminate or modify, once expressed, gets locked into the requirements of Section 8(d); Third, the Board offers no legislative history to support an interpretation which, on

its face, must be set down as unrealistic. For the Board knows, from its long experience, that parties do, indeed, change their desires and intentions in collective bargaining negotiations; and it is precisely from that context that this section derives its meaning. The realities of collective bargaining frequently disclose shifts in position similar to the shift taken here. Unions recognize, as this union did, that a company may not be able to grant increases, yet they request them, because their members demand "improvements." When, as here, and, as happens frequently between other unions and companies, a union abandons its first demand for modifications, it seems a wholly impractical construction of Section 8(d) to require obedience to the notice requirements even though all thought of modification is abandoned.

In any event, once the purpose of the strike is severed from contract modification or termination, it stands on a footing of its own absolutely divorced from the clutch of Section 8(d), 8(d)(4) and 8(d)(3). This, we submit, must be so unless the Board is to be permitted to function in a legislative capacity.

The Board cites *Retail Clerks*, 265 F. 2d 814 (JA 22a), in support of its "frozen intent" interpretation of Section 8(d).

In that case, the union *did seek* a modification of the contract. It served a 8(d)(1) 60 day notice of that intent. It served the 8(d)(3)[Mediation] notices on March 29, 1957 and ten days later began to strike. The union there *did not* abandon its desire to modify the contract, *the Union in this case did*. In the cited case, the Union called the strike *to obtain the modifications*. In the present case, the strike was not called for that purpose. In the present case, the *employees* struck because they refused to work under a "no-vested rights" clause. Moreover, in *Retail Clerks*, *supra*, it was the Union which was charged with a

refusal to bargain under 8(b)(3). This Court held that the Union, *seeking a contract modification* was obliged to serve the 8(d)(3) notice, that its strike, called sooner than 30 days after it served that notice, was a violation of Section 8(b)(3)[refusal to bargain] and hence it concluded (p. 819) "we think the Board was correct in holding the Union guilty of an unfair labor practice and in issuing a cease and desist order."

Thus, we submit *Retail Clerks*, 265 F. 2d 814, is not authority for the proposition for which the Board cites it (JA 22a), it offers no support to the Board's interpretation.

POINT TWO

Assuming, *arguendo*, Section 8(d) applies: the Board's interpretation of it is erroneous; Section 8(d)(4)'s loss of status provision was not intended to work an automatic discharge of employees who strike 60 days after their Union's notice to terminate is served because the Union later omits to file the 8(d)(3) notices.

Section 8(d)(4) loss of status provisions says "Any employee who engages in a strike within the 60 day period specified in this subsection" [subsection 4 says, in brief, the terms of the contract must be kept in force "for a period of 60 days after *such notice*" (the 8(d)(1) notice of modification or termination is sent)] "shall lose his status as an employee of the employer engaged in the particular dispute, for the purposes of Sections 8, 9 and 10 of this Act as amended."

Assuming, that 8(d) applies, we concede that under this Court's decision in *Retail Clerks, supra*, the union's failure to file 8(d)(3) notices constituted a *refusal to*

bargain by the union. It follows from that, that the employer, upon discovering the union's omission in that respect, could have used the Board processes and filed with it a charge against the union, under Section 8(d)(3) [refusal to bargain]; instead, it chose the route of self-help, to discharge the employees under the pretext that the strike against the Company's contract modification proposal was, absent the filing of Section 8(d)(3) notices, a violation of 8(d)(4); in truth and in admitted fact (Ayers quoted, *supra*), the discharges were motivated by a desire to get rid of the union and start "with a clean slate".

The Board's interpretation of Section 8(d)(4), loss of status, as being of a piece with, and hooked onto the union's obligation under 8(d)(3) does not comport with a common sense reading of the statute.

In addition, the Board's interpretation ought to be rejected for the reasons listed below:

(1) The Board rejected the plain meaning of the statute.

Intent must primarily be determined from the language of the statute itself (*Flora v. United States*, 357 U. S. 63, 2 L. ed. 1165); the plain meaning of the Act must be adopted (*Jay v. Boyd*, 351 U. S. 345, 100 L. ed. 1242); and where, as here, the meaning is apparent (*Rosenman v. United States*, 323 U. S. 658, 89 L. ed. 535; *Ex parte Collett*, 337 U. S. 55, 93 L. ed. 1207), the need for interpretation is not present, and may not be indulged in (*U. S. v. United Mine Workers*, 330 U. S. 258, 91 L. ed. 884).

And in any event, there is no rule of statutory construction which precludes the use of common sense. We submit the application of this latter rule, and any of the foregoing, dissolves the difficulties with Section 8(d)(4).

The loss of status provision of Section 8(d)(4) states "Any employee who engages in a strike within the 60 day period specified in this sub-section shall lose his status as an employee * * *". The 60 day period in the subsection 8(d)(4) occurs in the following sentence: "continues in full force and effect, without resorting to strike or lockout, all the terms or conditions of the existing contract, for a period of 60 days after *such notice* is given * * *".

The words "*such notice*" refer to the provisions of Section 8(d)(1) requiring the service of a notice by a party to a contract desiring to terminate or modify it; following that statement there appears Section 8(d)(1) which states that such a party must serve "a written notice upon the other party of the proposed termination or modification 60 days prior to the expiration date thereof * * *".

One need not search beyond the plain grammatical structure of the language of the loss of status provision of Section 8(d)(4) to conclude therefrom: that the words "within the 60 day period specified in this subsection" refer to a one and only one 60 day period. This is necessarily so as a result of the use of the word "*the*" to describe the period. The period described is singular and particular. It is the one and only period marked out by language of Section 8(d)(1).

The Board in its opinion recognized the validity of this construction in the following language (JA 25a): "It is true that subsection 8(d)(4), which limits the rights of the contracting parties to resort to strike or lockout, defines the proscribed period as one of '60 days after such notice is given' and that this Board and Court had recognized that the period thus described refers to that 'specified' in 8(d)(1)". This conclusion certainly prompts the question: "What justifies a departure from so plain meaning?"

Certainly not common sense. The employees did not know its union had not filed 8(d)(3) notices. Why should

they be punished for an omission of their bargaining agent of which they were ignorant?

The employees refrained from striking during the 60 day period specified in 8(d)(4) and 8(d)(1). They did all they could do to fulfill their obligations under the act. So far as they knew them. How could the Act's purposes be fulfilled by allowing the employer to discharge, with impunity, employees who engage *after* 60 days, in concerted activity to protect their wages? Where can one find in Section 8(d) that the Employer is entitled to carry out his admittedly antiunion plan to get rid of the union by using Section 8(d)(4) in this fashion.

We turn now to examine what the Board offered in support of its admitted departure from its own reading of the statute and also from that given to it by the Courts.

- (2) The Board erred in concluding that Section 8(d)(4) must be read to deprive the employees of their status because, though they waited 60 days before striking, their Union did not file the 8(d)(3) notices, a fact of which they were entirely ignorant.**

While admitting, as noted in (1), that the Board and Court have recognized that the 60 day period is the one described in 8(d)(1) (JA 25a), the Board concluded that, if the union is late with the 8(d)(3) 30 day notices, the *employees* must withhold strike action until the union files those notices and wait for thirty days thereafter.

In other words, the literal and plain meaning of Section 8(d)(4)'s loss of status provision, though specific enough in itself, must be overridden, despite the plain prohibition against limitation of the right to strike "in a manner not specifically provided for in the Act" (Section 13) (JA 27a).

In support of its idea that the various parts of Section 8(d) must be read together (JA 25a) the Board cites (foot-

note 13, JA 25a) *Retail Clerks International Association; Local 1179 (J. C. Penney Company)*, 109 NLRB 754. We cite the persuasive answer of Member Fanning (JA 36a) to this contention:

"In *Retail Clerks International Association, Local No. 1179 (J. C. Penney Company)*, upon which my colleagues rely, the union had served the 60-day notice upon the company of its desire to modify its contract. Approximately 4 months later, the union and all employees struck without notification having been served on the Mediation Service under Section 8(d)(3). The Board found that the union violated Section 8(b)(3) by its failure to comply with this provision. It ordered the union to cease refusing to bargain with the company by failing to notify the Mediation agencies within 30 days after it had served notice upon the company of its desire to modify the contract. In effect, the Board ordered the union, as the exclusive bargaining agent of the employees, to bargain with the company. In my opinion, the result achieved in *Penney* and related cases collides with the position my colleagues have taken here and presents an obvious anomaly. They now assert that strikers lose their status as "employees" if they engage in a strike whenever their union fails to serve the 30-day notice under Section 8(b)(3). It would therefore follow that, where as in *Penney* and the instant case, *all* employees engage in a strike under these circumstances, the union thereby ceases to be the majority representative and the Board is powerless to perpetuate a bargaining relationship. The forced continuation of such a relationship can only be justified if the union is in fact a majority union. And this fact can be established only if the strikers remain 'employees' of the company. It seems to me that *Penney* and the related cases more appropriately belong in my camp."

- (3) Legislative history does not support the Board's view that Section 8(d)(4)'s loss of status provision was intended to be construed by stretching the time prohibition against striking beyond 60 days, to include the time during which the Union omits to file the 8(d)(3) notices; and to impose the sanction against employees who strike after 60 days.

The Board cites (JA 27a, following footnote 10) only a remark by Senator Taft (93 Cong. Rec. 3835, Ap. 35, 1947) and a Report of the Joint Committee on Labor-Management Relations.

Member Fanning's reply to the Board's inconclusive citations is, we submit, decisive (JA 32a, 33a).

He cited not the remark of a Senator, distinguished though Senator Taft was, but the Senate Report (footnote 21, JA 32a).

He cites further (JA 32a, footnote 20) the Senate Minority Report.

We quote from his dissent (JA 32a, JA 33a):

"The specific relation of the 'loss-of-status' provision to the 60-day period set out in Section 8(d)(1) and (4) was not the result of happenstance but of compromise. The opponents of the provision argued against its inclusion in that Section. They contended that any restriction on the right of employees to strike during the renegotiation period would impose an additional penalty upon them inasmuch as their bargaining representative was already foreclosed from taking strike action on pain of committing an unfair labor practice.²⁰ While the argument did

²⁰ S. Min. Rep. No. 105, Pt. 2, on S. 1126, 80th Cong., 1st Sess. 21: "Under the provisions of section 8 both unions and employers are required to bargain collectively. A violation of this requirement is made an unfair labor practice, subject to a cease-and-desist order from the Board. Clearly a strike or lockout during the 60-day period would constitute an unfair labor practice. We can see no reasonable grounds for discriminating against the employees by providing an additional penalty which will cause them to lose their status as employees under the National Labor Relations Act." And see Cong. Rec., Sen. p. 4156, April 25, 1947.

not succeed in eliminating this legislative proposal, it did provoke the proponents of the clause to restrict its cope to the 60-day insulated period, for the legislative history of the proposal is literally punctuated with the equation of 'loss-of-status' to that period.²¹ "

²¹ See e.g., S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 24: "Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the terminal date, if they desire to terminate or amend. Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing the old contract has the duty to notify the new Federal Mediation Service of the impasse. Should the notice not be given on time, * * * it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period. Any employee who engages in a strike *during the 60-day period* would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is re-employed." (Emphasis supplied): H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. 35: "Any employee who engaged in a strike within the *60 day period just described* [in Sections 8(d)(1) and (4)] lost his status as an employee of the particular employer for the purpose of sections 8, 9, and 10 of the act." (Emphasis supplied.)

We submit that Member Fanning's analysis of the legislative history is more persuasive than the Majority's and that his reasoning in connection therewith should be adopted by this Court.

- (4) **The Board's interpretation negates and refuses to follow judicial precedent interpreting Section 8(d)(4), loss of status provision.**

Independent Union v. Proctor & Gamble, 612 F. 2d 181, 188 (C. A. 2) is a case directly in point. In that case Judge Hayes states " * * * the requirement of paragraph 3 of 8(d) that Federal and State agencies be notified is *entirely independent* of paragraph 4. There is no suggestion in the text that failure to meet the notice requirements of paragraph (3) will have any effect on paragraph (4). The only notice mentioned in (4) is the 60 day notice of termination." (Emphasis supplied.)

- (5) **The Board's interpretation disregards the plain words of Section 13.**

Section 13 of the Act expressly guarantees the right to strike, and cautions against cutting it down by interpretation;

"Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to effect the limitations or qualifications on that right." (Emphasis supplied)

It can fairly be said that the right to strike is the ganglion which articulates the other rights granted by the Act and makes the whole process of collective bargaining viable and with it the achievement of the Act's objectives. The concern for the right to strike has remained constant through many legislative vicissitudes in revamping and re-shaping national policy. As the U. S. Supreme Court stated in *NLRB v. Erie Resistor Corp.*, U. S., 53 LRRM 2121, 2127:

"While Congress has from time to time revamped and redirected National Labor policy, its concern for the integrity of the strike weapon has

remained constant. Thus when Congress chose to nullify the use of the strike it did so by prescribing the limits and conditions of the abridgment in exacting detail, e. g. Section 8(d)(4), 8(d) by indicating the precise procedures to be followed in effecting interference, e. g. Sections 10(j)(k)(l): Section 2806-2810, Labor Management Relations Act, and by preserving the positive command of Sections 13 that the right to strike is to be given a generous interpretation within the scope of the Labor Act. The Courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in their legitimate use of the strike."

We quote Member Fanning's dissent (JA 34a to 36a); concerning this aspect of the case.

"There is, I think, an even more compelling reason why my colleagues' disregard of the plain words of Section 8(d) should cause concern. That Section seeks to further the dual statutory purpose of protecting the right of employees to engage in concerted activities and of fostering orderly collective bargaining, and, we are told, 'A construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it.' Section 13 of the Act cautions that 'Nothing in this Act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.' (Emphasis supplied.) The right to strike is, of course, one of the most fundamental afforded to employees. In light of the affirmative emphasis which the Statute places upon the freedom of employee concerted action, and the command of Section 13 that the hand of restraint be placed upon any restriction on such action unless 'specifically provided for,' I believe that a limitation on the right of employees to strike which goes beyond the 60-day period specified in Section 8(d)(1) and (4) must be more explicit and clear before it can be said to have

been intromitted in Section 8(d)(3)²⁴. For, under my colleagues' 'parity of reasoning,' the failure of a union to notify the Mediation Services, either because of inadvertence or in the belief that collective bargaining can be successfully concluded in the renegotiation period, may result in the forfeiture of the right to strike for weeks, or months, or even years after that period has elapsed. In my opinion, such a construction throws the concerted rights of employees into imbalance under the statutory scheme, and does little if anything to enhance true collective bargaining. If Congress has sought to relate the "loss-of-status" provision to each and every notice clause in Section 8(d), it could readily have done so. It has not. This is made abundantly clear by Judge Hays' observation in *Independent Union v. Proctor & Gamble*, ed 6-17-63 312 F. 2d 181, 188 (C. A. 2) that " * * * the requirement of paragraph (3) [of 8(d)] that Federal and State agencies be notified is entirely independent of paragraph (4). There is no suggestion in the text that a failure to meet the notice requirements of paragraph (3) will have any effect on paragraph (4). The only notice mentioned in (4) is the 60-day notice of termination.' "

²⁴ See *N.L.R.B. v. Lion Oil Co., et al.*, *ibid.*; *Mastro Plastics Corp., et al. v. N.L.R.B.*, *supra* at p. 287. And see *NLRB v. Eric Resistor Corp.*, — U S. — 53 LRRM 2121, 2127: "While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgement in exacting detail, *e.g.*, §§ 8(b)(4), 8(d), by indicating the precise procedures to be followed in effecting the interference, *e.g.*, § 10(j)(k), (1): §§ 2806-2810, Labor-Management Relations Act, and by preserving the positive command of § 13 that the right to strike is to be given a generous interpretation within the scope of the labor act. The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike."

- (6) Chairman McCulloch's opinion, espousing a wholly separate theory, not adopted by the Board, and holding that the strike was not protected by Section 7 because the Union had failed to serve the 8(d)(3) notice, is contrary to law, and finds no support in the Act.

The Chairman held that "the strike engaged in by the discharged employees was unlawful under Section 8(d)(3) of the Act because of the Union's failure to give the 30 day notice therein required, and as such was an unprotected concerted activity for which the employees could validly be discharged."

The opinion of Member Fanning (JA 38a) persuasively disposes of this contention in these words:

"There is yet another reason why I disagree with the result reached by my colleagues. They assert that, even without regard to the 'loss-of-status' provision, the strikers were validly discharged because the strike was unlawful under Section 8(d)(3) and hence the strikers were engaged in an unprotected concerted activity. This is not a case where employees have struck in violation of a no-strike pledge (e.g., *Budd Electronics, Inc.*, 137 NLRB 498) or to compel an employer to violate the Act (e.g., *MacKay Radio and Telegraph Company, Inc.*, 98 NLRB 740), decisions to which my colleagues advert to support their alternative thesis. In those cases, the strike was in direct support of the illegal object which their union was pursuing. Here, the employees struck, not in furtherance of the Union's failure to give the 30-day notice under Section 8(d)(3), but to exert economic pressure upon Respondent to obtain a lawful collective-bargaining agreement. Their strike was therefore totally unrelated to their Union's violation of that Section. I fail to perceive how such a strike acquired a taint of illegality or how the employees' otherwise lawful conduct can be translated into unprotected concerted activity. If my colleagues' assertion is pressed to its logical conclusion, then all employee strike action, regardless how lawful its object or purpose,

becomes unprotected whenever their union concurrently violates the Act. I submit that this conclusion lack support both in the Statute and in decisional law."

Conclusion

The Board's decision and order cannot be sustained on either theory: Section 8(d) and all of its subsections are wholly inapplicable to the fact situation revealed in the case at bar; even if, *arguendo*, Section 8(d) is applicable, the Board's interpretation is erroneous and should not be upheld.

Accordingly, this Court should reverse the Board's decision and order, and remand this case to the Board with instructions to fashion an order to remedy the violations of Sections 8(a)(1)(3) and (5) charged in the complaint, and found by the Trial Examiner.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, et seq.) are as follows:

RIGHT TO STRIKE

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

RIGHT OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

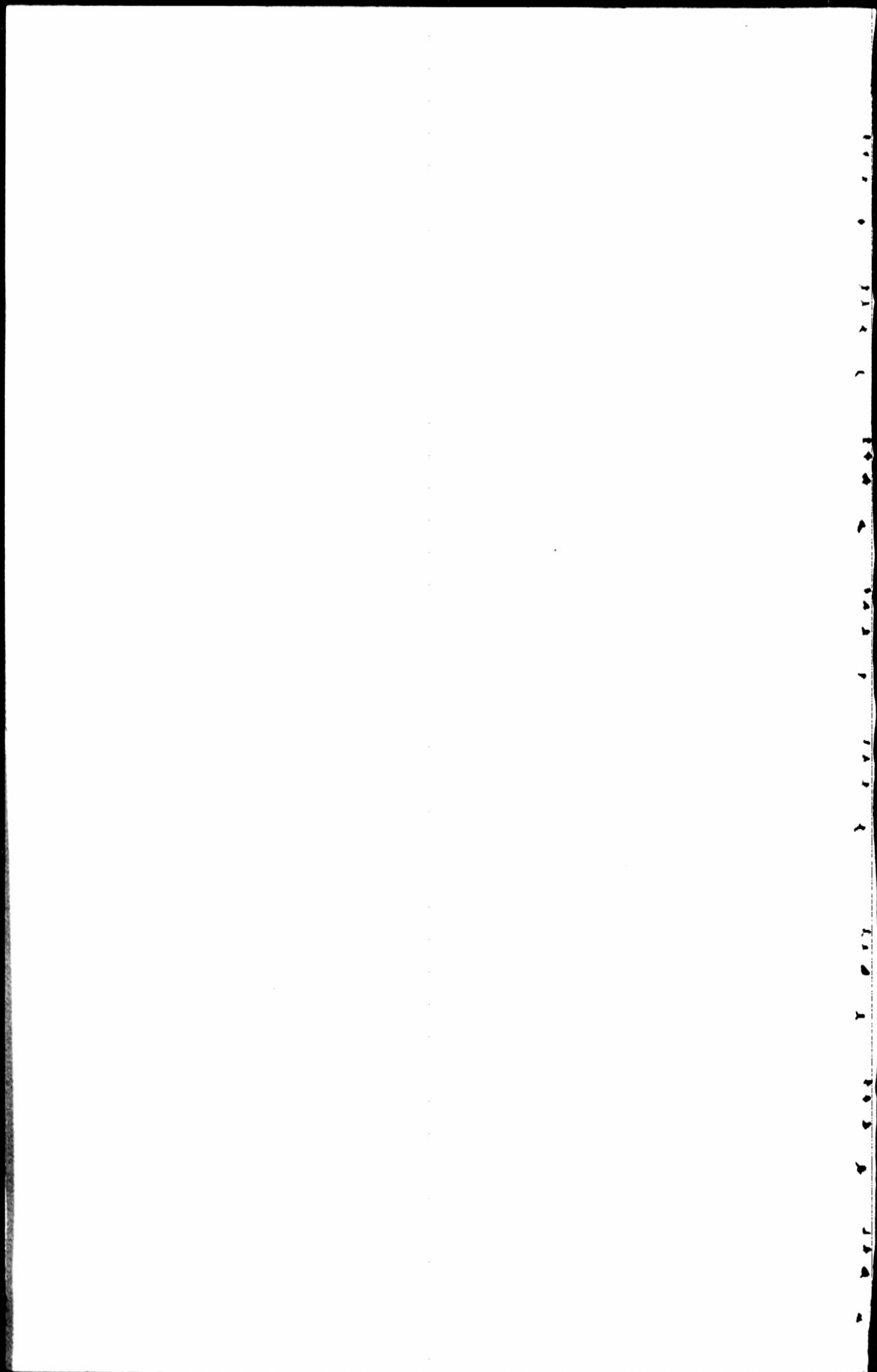
(2) offers to meet and confer with the other party for the purpose of negotiating a new contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously there-

with notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.



PETITIONER'S REPLY BRIEF

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 17961

UNITED FURNITURE WORKERS OF AMERICA,
AFL-CIO and LOCAL 270, UNITED FURNITURE
WORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**ON PETITION TO REVIEW DECISION AND ORDER
OF NATIONAL LABOR RELATIONS BOARD**

United States Court of Appeals
for the District of Columbia Circuit

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FILED FEB 10 1964

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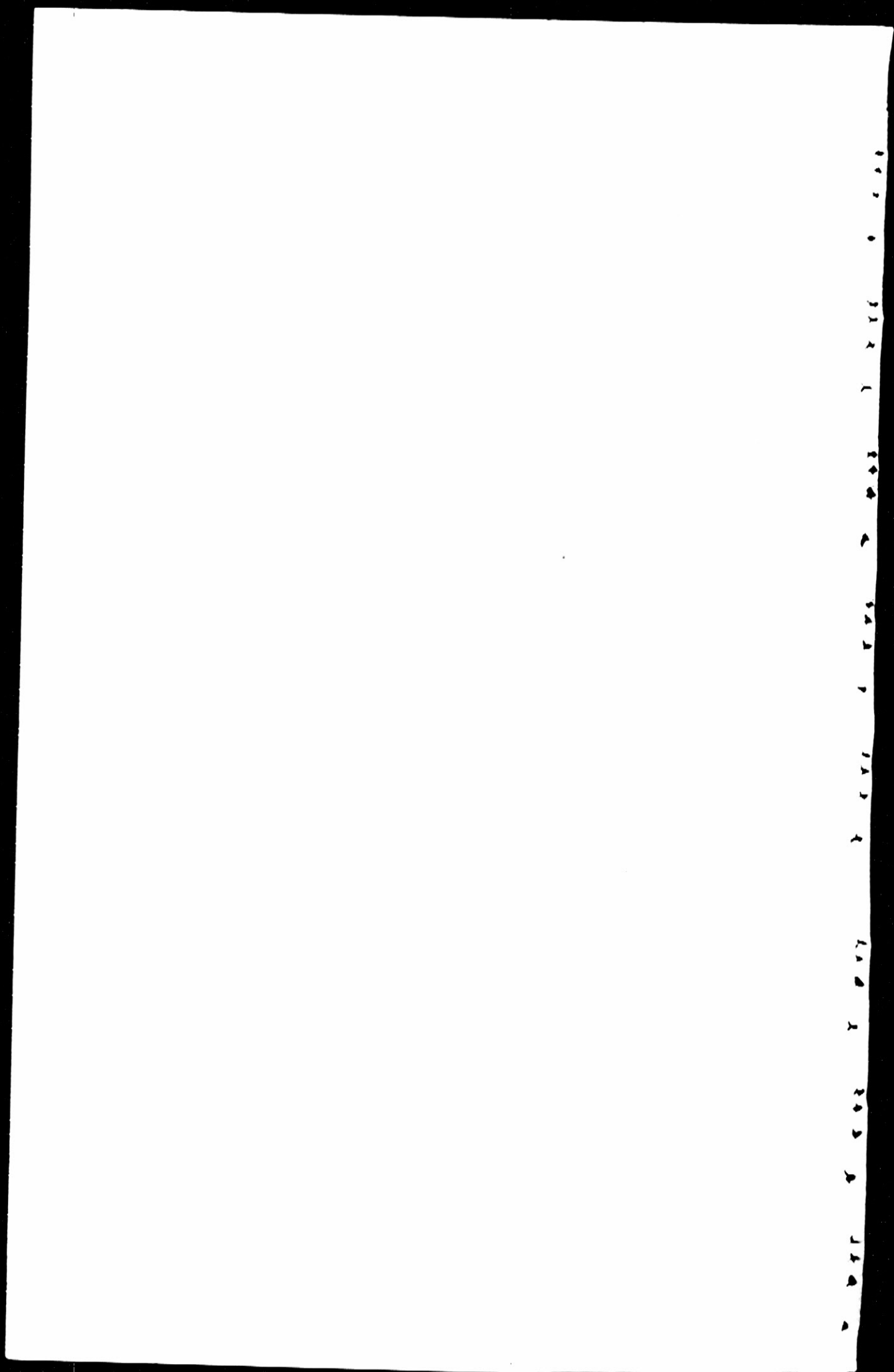


TABLE OF CONTENTS

	PAGE
Statement	1
A. Section 8(d) does not apply to the strike in this case, because the strike was not to "terminate or modify" a contract	2
B. Even if Section 8(d) applies, the discharge of the employees was improper	5
C. The Board disregards the specific prohibi- tion of Section 13 against construing that section so as to interfere with the right to strike	8
Conclusion	10

Table of Citations

CASES:

Insurance Agents v. NLRB, 260 F. 2d 736, 104 U. S. App. D. C. 218	6
International Union v. Wisconsin Employment Relations Board, 336 U. S. 245, 93 L. ed. 657 ..	9
*Local Union No. 9735, United Mine Workers v. NLRB, 258 F. 2d 146, 103 U. S. App. D. C. 294 ..	4, 5
Local Union 219, Retail Clerks International Asso- ciation v. NLRB, 105 App. D. C. 232, 265 F. 2d 814	5, 6
NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240	10
NLRB v. International Rice Milling Co., 341 U. S. 665, 93 L. ed. 1277	10
NLRB v. Insurance Agents' International Union, 361 U. S. 477, 498, 4 L. ed. 2d 454, 469, 80 S. Ct. 419	9

* Authorities chiefly relied upon.

CASES (Cont'd):	PAGE
*NLRB v. Drivers Local Union, 362 U. S. 274, 4 L. ed. 2d 710	9
*Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F. 2d 181, 188, cert. denied 374 U. S. 830	5, 8
Schultz Refrigerated Service, Inc., 87 NLRB 502	10
Sales Drivers, Helpers & Building Constr. Drivers Local 859, etc. v. NLRB, 97 App. D. C. 173, 229 F. 2d 514	10
MISCELLANEOUS:	
*The Reach of the Thirteenth Amendment, 47 Columbia Law Review 299	10

* Authorities chiefly relied upon.

United States Court of Appeals
For the District of Columbia Circuit

No. 17961

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO and
LOCAL 270, UNITED FURNITURE WORKERS OF AMERICA,
AFL-CIO,

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v.

NATIONAL LABOR RELATIONS BOARD.

Respondent.

**On Petition to Review Decision and Order of
National Labor Relations Board**

PETITIONER'S REPLY BRIEF

Statement

The Board's brief does not accurately reflect the whole record; it bases a number of its points on this partial consideration, and constructs other argument upon irrelevant precedent; hence, this reply brief is necessary.

Obviously disturbed by the cruelty of a Board decision which permits the firing of employees because their Union forgot to send a notice, counsel for the Board have sought in their brief to "sweeten" the result. They do this, first, by injecting a "policy" consideration which is irrelevant, and second, by presenting as an alternative holding of the Board a rationale which the Board nowhere adopted.

A. Section 8(d) does not apply to the strike in this case, because the strike was not to "terminate or modify" a contract.

Our principal argument throughout the Board proceedings was that Section 8(d) applies only to those strikes called to "terminate or modify" a contract, and that the strike in this case was not for either of these purposes. The Trial Examiner adopted our contention. The heart of his opinion is as follows (JA52a-53a):

"The notice requirements of Section 8(d)(1) and (3) do not apply to every strike. It has been held that they are inapplicable to unfair labor practice strikes. Nor do they apply to every economic strike, as the Respondent seems to argue. Of these requirements, the Supreme Court said in the *Mastro Plastics* case:

" 'The Board reasons that the words which provide the key to a proper interpretation of Section 8(d) with respect to this problem are "termination or modification." Since the Board expressly found that the instant strike was *not to terminate or modify* the contract * * * the loss of status provision of Section 8(d) is not applicable. We sustain that interpretation.' (Emphasis in original)

"Here, as in *Mastro*, the object of the strike was 'not to terminate or modify' the contract. It follows that here, as in *Mastro*, the loss-of-status provision of Section 8(d) of the Act does not apply. The strikers were therefore engaged in a lawful economic strike protected by Sections 7 and 13 of the Act. It was accordingly a violation of Section 8(a) (1) and (3) of the Act for the Respondent * * * to discharge the employees * * * because they participated in such concerted activity."

The Board gave two reasons for reversing the Trial Examiner and holding that Section 8(d) applies to this strike:

First: The Union, having originally notified the Company of a desire to modify the agreement, could not strike without meeting all the notice requirements of Section 8(d) even though it later abandoned its desire to modify, and struck only to obtain a continuation of the old contract (JA 21a-22a).

Second: The Union *was* striking to modify, because it sought "a contract with modifications already agreed upon in the course of the negotiations" (JA 22a).

In our opening brief, we demonstrated the deficiencies of each of these reasons. The first, which we called the "frozen intent" theory, is contrary to the language of the statute, is unsupported in the legislative history, and ignores an important "fact of life" in collective bargaining: that parties' desires *do* change, and that desires to modify may change in the course of bargaining into desires to preserve the *status quo* (See our opening brief, pp. 20, 24-26). The Board's second reason, we pointed out, flies in the face of the Trial Examiner's express *finding of fact* that the strike was *not* for the purpose of obtaining the modifications already agreed upon (JA 51a, n. 13 and text thereat; see our opening brief, pp. 23-24).

On review, Board counsel, paying little more than lip service to the obvious difficulties in the Board's reasoning, have concentrated instead upon an elaborate effort to show that mediators are helpful fellows, and that the Board's result—however shocking on its face—is justifiable as an attempt to foster greater utilization of mediators (Bd. brief, pp. 21-27). This demonstration purports to prove that "had the Union advised the Government mediators of the dispute between the parties and thereby enlisted their aid, there might have been no strike" (Bd. brief, p. 26).

We have no quarrel with the Board's high opinion of mediators; indeed we share it. Nonetheless, we are compelled to point out that this consideration is totally ir-

relevant to the issues before this Court. We do not agree with Board counsel that this dispute was one particularly amenable to mediation; the record belies that view.¹

Whether or not the dispute could have been mediated is irrelevant. Section 8(d) specifies the situations in which a mediator must be notified: when the Union seeks to "terminate or modify" a contract. A Union seeking to modify may not by-pass the mediator because he is not likely to be helpful: no more can the Union be *required* to notify the mediator when it is *not* seeking to modify, simply because he *might* be helpful.

Two controlling decisions demonstrate that the mediator's potential utility is irrelevant. In *Mastro Plastics*, the Union had served an 8(d)(1) notice of intent to modify, and struck without serving an 8(d)(3) notice on the mediator. Its strike, however, was not in support of its attempt to modify, but rather against an unfair labor practice. No doubt a mediator might have been quite helpful in resolving that dispute. But the Supreme Court held that the strike did not violate 8(d), because it was "not to terminate or modify the contract" (350 U. S. at 286).

Similarly, in *Local Union No. 9735, United Mine Workers v. NLRB*, 103 U. S. App. D. C. 294, 258 F. 2d 146 (1958), the Union, without serving any 8(d) notices, struck to compel the employer to ignore an arbitration award. Again, a mediator surely would have been helpful in resolving the dispute. Nonetheless, this Court held the strike

¹ Indeed, this case is a curious one in which to praise the value of mediation. On June 7, the parties were one issue apart from settlement. On June 8, after the mediator's intervention, the company fired its striking employees and refused to have anything further to do with the Union. The mediator's sole contribution had been to advise Company counsel that the 8(d)(3) notice had not been sent, thus providing the incentive for the subsequent discharges. See Board brief, pp. 10-13, for a piquant telling of this story.

not violative of Section 8(d), because "Section 8(d) does not apply * * * where the attempt is not to modify the terms of an agreement" (258 F. 2d at 149).

The Board (at p. 33 of its brief) seeks to restrict the broad language of *Mastro Plastics* solely to unfair labor practice strikes. That effort must fail. For this Court's decision in *Local Union No. 9735* holds that *Mastro Plastics* applies to economic strikes as well, so long as they are not to "terminate or modify" an agreement.

B. Even if Section 8(d) Applies, the Discharge of the Employees was Improper.

The Board's task is not ended, however, even if Section 8(d) is held applicable to the strike in this case. For even then the Board's decision depends upon the soundness of two additional propositions on which it relied:

(1) that a union which calls a strike more than 60 days after the 8(d) notice is served on the employer, but less than 30 days after an 8(d)(3) notice is served, violated 8(d)(4); and

(2) that those who participate in such a strike lose their status as "employees" pursuant to the final paragraph of 8(d).

For the first of these propositions, the Board relied exclusively on this Court's decision in *Local Union 219, Retail Clerks International Association v. NLRB*, 105 App. D. C. 232, 265 F. 2d 814. We wish to point out that Board counsel frankly acknowledge in their brief (p. 21, n. 18) that *Retail Clerks* is in conflict with a more recent decision of the Second Circuit in *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F. 2d 181, 188 cert. denied 374 U. S. 830, cited at p. 33 of our opening brief. We have refrained from an extended argument of this issue, for we are cognizant of this Court's rule that "one panel * * *

will not attempt to overrule a recent precedent set by another panel, even though one or more of its members may disagree with the ruling." *Insurance Agents v. NLRB*, 104 U. S. App. D. C. 218, 260 F. 2d 736. Nonetheless, we respectfully urge, in light of the intervening contrary decision of another Circuit, and the demonstration in this case of the unhappy results to which this court's *Retail Clerks* decision can lead, that the doctrine of *Retail Clerks* be overruled, or, at least, that it should not be extended to the next step, sought by the Board, to deprive the strikers of their status under 8(d)(4).

The second of the Board's premises—that if the Union's calling of a strike is unlawful because it has forgotten to notify the mediator, those who participate lose their status as "employees"—has obviously given Board counsel considerable difficulty. In our opening brief we demonstrated that this holding requires a distortion of statutory language hardly appropriate to reach so inequitable and iniquitous a result (See opening brief, pp. 26-35).

Aware of the difficulties inherent in the Board's reasoning, Board counsel have advanced an "alternative" argument which the Board majority did not adopt. Counsel suggest that even if the strikers did not lose their status as "employees", their activity was nonetheless "unprotected" (because in support of a union unfair labor practice) and they therefore were subject to discharge (Board brief, pp. 42-49). At some points in their brief Board counsel imply that the Board *itself* relied on this as an alternative basis for its decision (Board brief, pp. 14-15, 17-18, 44). In fact, however, this rationale, though relied upon by the concurring opinion (JA 28a-29a) was nowhere adopted by the majority. Board counsel ultimately concede as much at pp. 48-49 of their brief, where they state:

"We suggest these considerations only to show that rejection of the Board majority's determination that the 'loss-of-status' clause was applic-

able to the strike herein would not call for rejection of the Board's finding that the discharges were lawful. See the concurring opinion of Board Chairman McCulloch at J. A. 28a-29a."

At pp. 36-37 of our opening brief, we answered Chairman McCulloch's thesis on its merits. We pointed out that the employees' conduct might be unprotected if their object in striking was to prevent the filing of the mediation notices. Obviously, it was not. As the dissenting Board member pointed out, it can not be the law that "all employee strike action regardless how lawful its object or purpose, becomes unprotected whenever their union concurrently violates the Act" (J. A. 38a).

The cases cited by the Board (brief, pp. 42-49) to bolster Chairman McCulloch's thesis do not support it, nor do they diminish the force of Member Fanning's dissent (J. A. 37a, *et. seq.*). If they have any weight, it lies in their number, not in their relevance.

Clearly, *Southern Steamship and Fansteel* (brief, p. 44, n. 46) have nothing to do with this case. *Fansteel* dealt with a sit-down strike, and *Southern Steamship* concerned a mutiny aboard ship, both cases apparently dragged in by the forelock to import to this case a taint of the illicit by a process of association.

Hoover, Electronics, and Ohio Ferro Alloys (brief p. 44, n. 47) all were cases in which the Union violated the positive command of the Act, by conducting illegal boycotts.

Indiana Desk and American Rubber Products (brief, p. 44, n. 48) were cases where employees struck to compel the employer to do something illegal—grant wage increases, without the legally required prior approval of the War Labor Board.

In short, these holdings deal merely with obvious violations of a Federal statute (*e.g.* mutiny) or the equally

positive prohibition against engaging in conduct specifically forbidden by the Act.

They are question-begging precedents, for they assume that this strike violated the act, which is the question in issue.

C. The Board disregards the specific prohibition of Section 13 against construing that section so as to interfere with the right to strike.

Section 13 forbids its own construction so as to interfere with, diminish or impede the right to strike, except as *specifically* provided for in the Act.

The Board's brief (p. 40) states that " * * * the strike herein was 'specifically' forbidden by Section 8(d) of the Act and hence comes within the exception."

If Section 8(d) were that specific, it is strange that it takes the Board a sizeable number of pages to eke, by an elaborate process of construction, this alleged quality of specificity from Section 8(d). And the fact that the Board deliberated so long over this case argues that Section 8(d) is not so "specific" as the Board would like the Court to believe; neither the fact of Member Fanning's dissent, nor its content, assist the Board's argument of specificity, for he finds no specific exception to the right to strike in Section 8(d) beyond the waiting period of 60 days.

Moreover, *Procter & Gamble*, 312 F. 2d 181, 189, construing Section 8(d)(4) the way Member Fanning does, compels rejection of the Board's conclusion that Section 8(d) is "specific" in excepting from Section 13 the right to strike for periods longer than 60 days, where Section 8(d)(3) is not followed.

Finally, in evaluating the impact of Section 13 upon Section 8(d), the Board has turned a deaf ear to the caveat of the U. S. Supreme Court respecting how Section 13 must be construed.

The Board's decision (JA 21a, n. 4) concedes that "absent any violation of 8(d) the strike would appear to have been a lawful economic strike." In this connection, the Supreme Court said:

"Congress has been rather specific when it has come to outlaw particular *economic* weapons on the part of unions". (*NLRB v. Insurance Agents' International Union*, 361 U. S. 477, 498, 4 L. ed. 2d 454, 469, 80 S. Ct. 419.) [Emphasis supplied.]

The Supreme Court has strongly declared against an expansive reading of limitations on the right to engage in concerted activities (*NLRB v. Drivers Local Union*, 362 U. S. 274, 282, 4 L. ed. 2 at p. 717, 80 S. Ct. 706). The courts are commanded to resolve doubts and ambiguities in favor of safeguarding this right.

The Board nowhere in its brief accepts this doctrine, nor applies it to the plain language of 8(d)(4); instead, it has expanded the limitation on the right to strike by a process of illicit interpretation; nor does it apply the Court's caveat concerning the resolution of ambiguity in this area. Even if, *arguendo*, it was privileged to disregard the plain and literal words of Section 8(d)(4), it was still bound to resolve the ambiguities it created "in favor of safeguarding the right to strike as understood prior to the passage of the Taft-Hartley Law". (*NLRB v. Drivers' Local Union*, 362 U. S. 274, 282; 4 L. ed. 710, 717, 80 S. Ct. 706.)

In the *Fansteel* case, 306 U. S. 240, 258, 83 L. ed. 627, 635, 59 S. Ct. 490, and in *International Union v. Wisconsin Employment Relations Board*, 336 U. S., at p. 259, the Supreme Court recognized that Congress did not intend, by Section 13, to modify the body of law relating to strikes as it existed before the Wagner Act and the Taft Hartley law. That right, as it existed *before* Section 13 was passed, perseveres, remains viable and usable to protect the privilege of employees to cease work in concert because the em-

ployer intends to pay them unsatisfactory wages. Such action has been traditionally protected. (*NLRB v. International Rice Milling Co.*, 341 U. S. 665, 95 L. ed. 1277, 71 S. Ct. 961; *Re Schultz Refrigerated Service Inc.*, 87 NLRB 502; *Sales Drivers, Helpers & Building Constr. Drivers, Local 859, etc. v. NLRB*, 97 App. D. C. 173, 229 F. 2d 514, cert. denied 351 U. S. 972, 100 L. ed. 1490, 76 S. Ct. 1025.)

In this context, it would be strange to say that involuntary servitude is the price employees must pay to maintain their employment status. If that were true, constitutional issues of the gravest importance would be raised under the Thirteenth Amendment. (See, *The Reach of the Thirteenth Amendment*, 47 Columbia Law Review 299.)

CONCLUSION

For the reasons stated in our opening brief, and in this brief, we respectfully submit that this Court should reverse the Board's decision and order, and remand this case to the Board with instructions to fashion an order to remedy the violations of Sections 8(a)(1)(3) and (5) charged in the complaint and found by the Trial Examiner.

Respectfully submitted,

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